United States Court of Appeals for the Second Circuit



APPENDIX

In The

United States Court of Appeals

For The Second Circuit

KURT SCHMIEDER,

Plaintiff-Appellant,

LOUIS H. HALL, as executor of the estate of HELEN B. DWYER, deceased,

Defendent-Appellee.

On Appeal from the United States District Court, Southern District of New York.

APPENDIX JOINT

Volume III 618a - 900a

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DEFENDANT'S MEMORANDUM OF LAW IN(Filed July 7, 1969) IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT (Filed May 6, 1969) UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X :

KURT SCHMIEDER,

Plaintiff,

Civil Action File No. 69-1939

-against-

HELEN B. DWYER,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW

Defendant Helen B. Dwyer moves to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that it fails to state a claim against her upon which relief may be granted.

The cause of action alleged in the complaint, which defendant only accepts as true for the purposes of this motion, is essentially a simple one. It alleges a moral obligation on the part of defendant to return to plaintiff certain cash and securities located in America

which the plaintiff alleges he irrevocably gave to the defendant in 1938, when their seizure from him by Nazi authorities appeared imminent. To avoid obvious problems with the Nazi authorities, plaintiff, a German citizen then and now living in Germany, alleges he obtained the advice of New York attorneys and upon such legal advice he made a transfer of these assets to defendant Dwyer, then a secretary in the attorney's office. He alleges he was advised that this transfer would be (complaint, par. 6): "impregnable at law, leaving a mere moral obligation" to return the property at a later time. Mrs. Dwyer was and still is an American citizen resident in New York.

The complaint then alleges that at a later time the United States Government seized the assets from Mrs. Dwyer as "enemy alien property" and in an action by her for its return, the plaintiff assisted her in obtaining the return to her of part of it and was promised by her that for this assistance that (complaint, par. 9): "his moral interest would be preserved".

On this basis plaintiff now seeks to impose a constructive trust upon the said property and asks for an accounting. It is however crystal-clear that the complaint

at a st alleges a <u>moral</u> obligation to return the property, and a moral obligation, no matter what its strength, can never support a claim for relief. Therefore since this complaint does not allege a legal obligation, the said complaint must be dismissed.

From the face of the complaint it appears that all the principal actors, except for the plaintiff herein, were New York residents, and that all of the transactions involved here took place within the State of New York.

Therefore New York law applies. Hazel Bishop, Inc. v. Perfemme, Inc., 314 F.2d 399 (2nd Cir. 1963); Auten v. Auten, 308 N.Y.155 (1954).

Turning to that law, the New York authorities are unequivocal that a moral obligation will not support a cause of action. See for example Pershall v. Elliot, 249 N.Y. 183 (1928) where the New York Court of Appeals stated succinctly at page 188:

"A previous moral obligation is insufficient as a consideration to support an action to enforce an executory contract.
... a mere moral or conscientious obligation, unconnected with a prior legal or equitable claim, implies no duty and is not a sufficient consideration to support a promise."

To similar effect is <u>Parsons</u> v. <u>Teller</u>, 188 N.Y. 318 (1907).

It is clear from a reading of the complaint that the plaintiff knew he was giving his property away since he unequivocally alleges in paragraph 6 that he had an attorney's opinion that his transfer to her was "impregnable at law". He further asserts in paragraph 9, not that his moral interest later became a legal interest, but merely that in consideration of his assisting the defendant "his moral interest would be preserved". (Emphasis added). Consequently the only thing that exists today is a moral interest and the law of the State of New York, supra, is that such an interest is insufficient to sustain a cause of action.

CONCLUSION

For the foregoing reasons it is submitted that the complaint herein should be dismissed.

Respectfully submitted,

OWEN & TURCHIN Attorneys for Defendant Helen B. Dwyer 60 East 42nd Street New York, New York 10017

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO FOREGOING MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff, :

CIVIL ACTION FILE

No. 69-1939

- against -

HELEN B. DWYER,

Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Defendant has filed a motion to dismiss on the ground of the asserted failure of the complaint to state a claim upon which relief may be granted. Defendant relies on plaintiff's use in the complaint of the words "moral obligation", and cites as authority two cases holding that past consideration is insufficient to support a new promise. The Pershall case was an action on a contract resting on a will, as to which the court said:

"It expresses no consideration... 'The doctrine that past consideration is no consideration is well recognized and universally enforced.' Williston or Contracts, section 142... A previous moral obligation is sufficient as a consideration to support an action to enforce an executory contract. Parsons v. Tellor, 188 N. Y. 318, 30N. E. 930."

The Parsons case holds in part:

"The first question, therefore presented is whether there was a valuable consideration which would have supported the contract... it seems to us plain that the agreement was a mere voluntary provision in favor of the plaintiff made by the deceased out of motives of gratitude and affection."

The issue in the cases relied on by defendant, whether past consideration will support a new promise, is entirely different from the issue in the present case. The obligation undertaken by the defendant was direct consideration for plaintiff's transferring the assets to her, and thus in no sense the type of mere moral obligation to which the opinions in those two cases refer. "Moral", in the sense clearly intended in the complaint, as indicated in the recitation of the facts set forth therein, means conforming "to the generally accepted rules which society recognizes should govern everyone in his social and commercial relations with others" (58 C. J. S. 1199), and giving rise to a duty valid and binding, although not enforceable by an action at law.

In Taylor v. Hotchkiss, Fourth Department, (1903) 81 AD 470, 477; 80 N. Y.S. 1042, 1048, it has been held:

We think that the moral obligation assumed by the debtors, having the purpose suggested, to secure payment in full of a prior indebtedness, may be regarded as being so connected with and relating to a prior legal obligation, as to bring it within the characteristics of moral obligations which are held sufficient to furnish a legal consideration for subsequent promises or agreements. It has been held that a mere obligation of morals or conscience, entirely disconnected with and having no origin in any legal or equitable obligation, would not be sufficient to operate even as a consideration for a promise or agreement. That, however, is not this case. (Goulding v. Davidson, 26 N. Y. 604, 610; Ehle v. Judson, 24 Wend. 97.)"

In Goulding v. Davidson (1863) 26 N. Y. 604, 611 the New York

Court of Appeals recognized the legal effect of a moral obligation with

the following words:

"The goods were valuable and the defendant personally received the benefit of them; and the price she agreed to pay therefor, is a debt which, "in equity and conscience", she ought to pay. In other words, she ought in common honesty to pay for the goods. Her promise so to do was made for value actually received by her personally; and it was to discharge a moral obligation founded upon an antecedent valuable consideration, created for her own personal benefit, and at her special instance and request; and I am of the opinion the law makes such promise obligatory upon her."

The present suit is an action in equity to impose a constructive trust. The purpose of this remedy was stated by Cardozo J., in the leading case of Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 122 N. E. 378, 380 (1919) in the following terms:

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Moore v. Crawford, 130 U.S. 122,128, 9 Sup. Ct. 447, 32 L. Ed 878; Pomeroy, Eq. Jur. section 1053."

The Beatty case was followed in the more recent decision in

Coane v. American Distilling Company, 295 N.Y. 197, 81 N.E. 2d 87,

90, where in an opinion by Fuld, J. Impressing a constructive trust on
certain stock, the court held:

"While legal title is in the individual defendants, the resactually belongs, by operation of law, to American Distilling (See Beatty v. Guggenheim Exploration Co. 225 NY, 380, 386, 122 N.E. 378, 380; see, also Restatement,

Restitution, section 160) and under the circumstances disclosed by the pleadings 'equity's intervention is essential."

The section of the Restatement of Restitution referred to in the foregoing opinion reads as follows:

"When a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."

Comment (a) under this section reads in part:

"A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but is imposed as a remedy to prevent unjust enrichment."

Comment (d) contains the further statement:

"In most cases when a constructive trust is imposed the result is to return to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a lose to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position in which he was before the defendant acquired the property."

For this purpose, the following rules applicable to the consideration of motions to dismiss for the failure of the complaint to state a cause of action, should be borne in mind:

- 1. Pleadings should be construed to do substantial justice (Rule 8 (f), F.R.C.P.).
- 2. A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of it, and mere

vagueness or lack of detail is not a ground for a motion to dismiss, but rather a motion for more definite statement (Moore, Federal Practice, Vol. 2A, par. 12.08 page 2273).

Turning now to the complaint's factual obligations:

Plaintiff lived and worked in the United States for many years, and returned to his birth place in Germany in 1911, leaving his investments in the United States as securities and a bank deposit (Par. 4). Prior to World War II, in or about 1938, he was advised by New York legal counsel and a New York certified public accountant in regard to his fears that the Nazi regime might marshal his assets in the United States for the purposes of the objectives of that regime, and in particular in regard to his desire to find a way of protecting his assets (Par. 5). In accordance with the advice of said persons, he transferred his said cash and securities to the defendant, who was at that time a secretarial employee of his attorney in New York, and whom he had never met or heard of previously (Par. 6). In doing so, he relied on the opinion of his counsel that this transfer would be impregnable at law, so that he need have no fear as to his non-disclosure to the German authorities of those assets, and the possible consequences of violating the strict laws in effect there for the disclosure and marshalling of foreign exchange, and that he would still be in a position to claim the return of the property after the emergency had passed.

Plaintiff had no communication with anyone in the United States during World War II, and after the war was sentenced to prison for his anti-communist activities in the Russian-occupied zone of Germany where he lived. Meanwhile his American assets were seized as enemy alien property (Par. 7). Defendant filed an action for the return of said property, and required the assistance of plaintiff for purposes of the suit. Plaintiff gave his assistance toward establishing defendant's legal interest in the property, being in the Soviet Zone at the time, based on the promise that his moral interest to have the property restored to him would be preserved. As the result, defendant settled her suit, and received a portion of plaintiff's property (Par. 8-10).

Plaintiff was eventually able to leave the Soviet Zone, and then being in a position to assert his interest, was unable to obtain any information as to the whereabouts of the defendant, whom he finally succeeded in locating, and against whom he files this suit for the impression of a constructive trust on the property she received from him (Par. 11-12). Plaintiff has no remedy at law, and invokes the aid of equity (Par. 13).

Under the doctrine of constructive trust set forth above, it is submitted that the real number of grounds for equitable relief stated in the complaint.

First of all, the very nature of the transfer itself, being neither a transaction for consideration, nor a gift, gives rise to a presumption

of unjust enrichment which alone will support this action. A transfer which is neither a gift nor for consideration is ineffect. 1. Clearly, since the defendant was not even known to the plaintiff, she was not an object of any donative intent such as would give rise to a gift. Nor was there any consideration to support the transfer on any other ground. Thus based on the very purpose of the concept of constructive trusts, to avoid unjust enrichment, a cause of action exists.

Beyond this, moreover, the complaint asserts an agreement on the part of the defendant to recognize plaintiff's property interest.

This agreement, if proven, would establish the equitable basis for relief.

Further, the complaint alleges that plaintiff was led into making the transfer on the basis of representation on the part of his New York attorney, first, that if the property was transferred to his secretary and later that if plaintiff assisted defendant in her litigation, plaintiff's interest would be preserved. Misrepresentation is another basis for the imposition of a constructive trust, in the exercise of equitable jurisdiction. The leading case on the subject, Taylor v. Mullins, (1913) 152 S. W. 774, 151 Ky. 597, 599, as noted by Bozert or Trusts, Vol. 5, Section 473, page 30, note 59, states:

"It is a well-settled rule of equity that a misrepresentation constitutes fraud relievable in equity only when (a) it is untrue; (b) the party making it knew, or should have known, it to be untrue, and it was made by him to induce the other party to act or omit to act; party to act or omit to act;

Plaintiff, being an anti-nazi in Nazi-Germany in 1938, and an anti-communist in Soviet-occupied Germany after the war, was hardly in a position to make an independent investigation, and especially under these circumstances had a right to rely on the advice and representations of his New York attorney to make the transfer to his scenary.

Bogert on Trusts, Vol. 5, section 473, page 30, note 58.10, refers to the principle relating to reliance on advice of persons in a confidential relationship as set forth in Kloehn v. Prendiville (1957) 316 P. 2d 17, 154 Cal. App. 2d 156, in which the following is stated:

"Where a conveyance is procured by one in a confidential relation through false statements, the grantor may be excused from investigating the truth of the statements or reading the deed by reason of the confidential relation and the reasonableness of reliance on the grantee."

Had plaintiff desired to give his property away, he could certainly have found more suitable objects of his charity than a person not even known to him previously. He had a right to rely on his attorney to take suitable steps to protect his interest in his property, and upon the attorney's selection of his secretary as a representation of her integrity, these being two very material considerations in his acting on his attorney's advice.

In addition, even if the representations were not sufficient to give rise to a basis for the imposition of a constructive trust, plaintiff would have a cause of action based on mistake, since plaintiff has alleged his understanding that his interests would be preserved follow-

ing the transfer. Even a unilateral mistake on the part of the transferor is sufficient to constitute a gratuitous transferee a constructive trustee.

See Scott on Trusts, 3d Edition (1967) Vol. V sec. 465, page 3427,

Bogert on Trusts, 2d Edition (1960) Vol. 5, pages 41 et. seq., and Lamb

v. Schiefner, Second Department (1908) 129 A. D. 684, 114 N. Y. S. 34.

Finally, the undue influence arising out of the confidential relationship combined with the duress conditions existing as to plaintiff in Nazi and Soviet-occupied Germany, the penalties including death which he would encounter if the authorities there were to learn of foreign assets owned by him before or after the war, and the power arising in the New York attorney and his secretary, by reason of their knowledge of the existence of the property in the United States and plaintiff's not having made disclosure thereof to the German authorities, to cause such penalties to be meted out to plaintiff, would provide a further basis for equitable relief. Plaintiff was placed in a position of being required to make a blind acceptance of his counsel's proposal. Bogert on Trusts, 2nd E dition (1960), Vol. 5 Sec. 474, page 47, Note 90.5. A transfer under such circumstances is almost presumptively to the imposition of trust responsibility, and this is strenghened by the extreme improvidence of the transfer under any other circumstances. Kazarus v. Manufacturers Trust Co., 4 A. D. 2d. 227, 164 N. Y. 5. 2d. 211 (1957), affirmed at 4 N. Y. 2d. 930, 175 N. Y. S. 2d. 172, as second inches Drutys opening

quoting Scott on Trusts 2d Edition identical with 3d Edition (1951) Vol. IV, Sec. 333, 3p 2632:

" The question in each case is whether in view of all circumstances the settlor was improperly induced to create the trust. The mere fact that he was pursuaded by another to create the trust, whether that other was the rustee or a beneficiary or a third person is not of itself a sufficient ground for setting aside the trust. The mere fact that there was a confidential or fiduciary relation between the settlor and the trustee or the beneficiaries of the trust is not of itself a sufficient ground for setting aside the trust. Nor is it necessarily sufficient that it was improvident for the settlor to create the trust, or that he failed to take independent advice of an attorney or of others before creating the trust. There is no rule which automatically determines whether or not the trust can be set aside because of undue influence. The question in each case is whether the trust was created under such circumstances that it would be inequitable not to permit the settlor to set it aside. "

As stated in the Beatty opinion referred to on page 3 above:

" A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."

Therefore, even if the facts of this case do not fall precisely into any of the foregoing classes, the circumstances could still be found to have resulted in unjust enrichment, the touchstone of the constructive trust concept, and the basis for equitable relief. I fend into relies on a strict definition of terms utilized in the complaint, but does not attempt to explain on what basis she feels that a transfer made to her without consideration or donative intent should vest equitable title to property in her, particularly when the purposes of the transaction clearly set forth in the complaint were to protect plaintiff from possible

prosecution by reason of his non-disclosure to the German authorities, and to protect his property interests.

Although not argued by defendant, plaintiff feels that some mention should be made of the possible argument that some time after the transaction was completed, the alien property laws would have prevented this type of transaction, and that plaintiff therefore would have, lost the property had it not been for the defendant. The transfer was not illegal when made, and in any event, as the law is summarized in Scott on Trusts, sec. 422, 4, Vol. 4, page 3268:

"Where the settlor was ignorant of the facts which made the trust illegal, he is not precluded from recovering the property from the trustee. The mere fact, however, that the settlor was ignorant of the law making the trust illegal is not held to be a sufficient ground for permitting him to recover the property from the trustee. If, for example, his purpose was to evade the claims of his creditors, the mere fact that he did not know that the trust was illegal on his ground is not a sufficient ground for permitting him to recover the property. Where the trustee however, misrepresented the law to him and thereby induced him to create the trust, he can recover on the ground that the parties are not in equal fault."

Plaintiff was, in any event, being under restraints in Germany, entitled to rely on his attorney's advice as to the legality of the transaction.

The following statement from Scott on Trusts, Vol. II sec. 117.2, page 895, relating to an analogous situation involving a transfer in violation of a statute prohibiting conveyances to aliens, is in point: In Ales v.

Epstein (Note 17:233 Mo. 434, 222 S. W. 1012 (1920))

"a woman who desired to purchase land on a partition sale arranged with the defendant, a confidential friend, that

he should attend the sale and purchase the land for her. He purchased the land but refused to convey it to her. She brought a bill in equity to enforce a constructive trust in her favor. It was held that since she was an alien and a statute provided that aliens should not acquire land, she could not recover. The court said that although when an alien has acquired the title to land, she can be deprived of it only in a proceeding brought by the state, yet a court of equity will not help her in acquiring the land. If the result is, however, that the friend who abused the confidence placed in him would be permitted to keep the land, it seems unfortunate. It is submitted that it would be more just to let her have the land unless the state brings a proceeding to reach it. The fact that the beneficiary of an express trust or land is an alien does not prevent his enforcing the trust against the trustee, as we have seen, and it would seem that an alien should be able to enforce a resulting or constructive trust, leaving it to the state to en force a forfeiture if it wishes. "

Plaintiff should not be deprived of the opportunity to obtain a determination of his rights against the defendant by reason of a possible governmental interest in enforcing alien property statutes. Such interest is the function of the public authorities to enforce, and is no defense to the claims of unjust enrichment, representations, overreaching and violation of confidential relationship clearly stated in the complaint.

However, should the Court feel that the complaint in its present wording is inadequate to express plaintiff's claims, or that any language therein must be deleted or revised so as to avoid the connotation suggested by the defendant, plaintiff asks leave to amend the complaint. The failure to permit amendment in order to remedy such defects has been held by the Second Circuit Court of Appeals to be error. Neeff v. Emery Transportation Co., 284 F. 2d 432, Downey v. Palmer,

114 F. 2d 116.

CONCLUSION

For the foregoing reasons it is submitted that the motion to dismiss the complaint should be denied, or in the alternative that plaintiff should be granted leave to amend his complaint.

Respectfully submitted.

WERNER GALLESKI Attorney for Plaintiff 70 Pine Street

New York, N. Y. 10005

Phone: 943 - 0076

| DEFENDANT'S REPL | Y MEMORANDUM OF MEMORANDUM IN | LAW IN | RESPONS
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| KURT SCHMIEDER, | | | | |
| | | : | | |
| | Plaintiff, | | | Action File |
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| HELEN B. DWYER | | | | |
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| | Defendant. | | | |
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DEFENDANT'S REPLY MEMORANDUM

This short reply brief is submitted in response to plaintiff's answering brief.

The cases cited in plaintiff's brief, where they are applicable, demonstrate the correctness of defendant's position. The quote from <u>Taylor</u> v. <u>Hotchkiss</u> at page 2 of plaintiff's brief is really dispositive of the claim here. "It has been held that a mere obligation of morals or conscience, entirely disconnected with and having no origin in

any legal or equitable obligation, would not be sufficient to operate even as a consideration for a promise or agreement."

Passing the question of the existence of any moral obligation which defendant vigorously denies, this quote sets forth defendant's position. All the complaint alleges is a moral obligation in no way connected with or having an origin in a legal or equitable obligation and therefore the claim does not set forth a cause of action.

Similarly, the allegation in paragraph 9 that there was a promise to preserve a moral obligation can rise to no higher level and remains merely a moral obligation which under the law is not enforcible.

Plaintiff's brief itself reveals his recognition that this is the law. The brief repeatedly refers to what is now termed a "property interest" in the gift to defendant. In the complaint however, it was simply a moral interest in the gift. This shift of language does not lend any more validity to the claim: the claim is, it is submitted, invalid as seeking to enforce a moral obligation regardless of plaintiff's attempt to constitute himself as the holder of some kind of property interest.

Plaintiff also raises the point that he had made a mistake in celying upon the representations of his prior

moreover the brief does not demonstrate any such mistake.

On the contrary, the complaint alleges that plaintiff was told by his then attorney that this gift to defendant was impregnable at law. No plainer words could have been used.

There was no mistake nor were there any misrepresentations.

Indeed plaintiff intended this to be an absolute gift and he sought the assurance that it would be impregnable at law because he was fearful of what the Nazi authorities would do to him if they learned he had assets outside of the country.

Plaintiff then takes the position in the brief that this was not really a gift because there were other people to whom he would rather have given the gift. The complaint does not set this forth but just as plaintiff is bringing in matters outside the complaint it is submitted that defendant may also do so. The fact is that plaintiff did have relatives here in the United States at that time and they all for various reasons refused to accept this gift. Defendant herself was reluctant to accept it. Considering the climate of the times this is certainly understandable. Not only was there the stigma of dealing with a German citizen but also, there was the probability of a lawsuit by the Alien Property Office which was in fact brought against

defendant. Further, for plaintiff to have made this gift to relives might have aroused Nazi suspicions.

Lastly plaintiff requests leave to replead if this motion be granted. It is submitted that not only should the complaint be dismissed but also that no leave to replead should be permitted. Nowhere does plaintiff set forth any indication of what he would plead if leave were to be granted. Obviously he could not deviate from his claim that this was merely a moral obligation, which as previously set forth fails to state a claim upon which relief can be granted.

Respectfully Submitted,

OWEN & TURCHIN Attorneys for Defendant Helen B. Dwyer

ENDORSED ORDER OF FRANKEL, D.J. ON SEPTEMBER 26, 1969 DENYING

Re: Schmieder v. Dwyer - 69 Civ 1939

639a

Endorsement

Defendant's motion assumes the large burden of demonstrating "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The burden is not sustained. laintiff's appeal to the "conscience of equity," Beatty Guggenheim Exploration Co., 225 N.Y. 380, 366 (1919), invokes principles that are intrinsically open-ended and adaptable to the infinite varieties of conceivably "fiduciary" relationships. See, e.g.; Restatement of Restitution §§160, 166 (1937); Bogert, Trusts & Trustees §§481-32 (2d ed. 1960); Sinclair v. Purdv 235 L.Y. 245, 252-54 (1923). It is not possible to say that the broad allegations of the complaint afford no room for the proof of facts to which such principles might apply. Evidently sensing the possibility that a court might so hold, counsel for defendant undertook upon argument of the motion to forecast evidentiary matters inconsistent with some of the complaint's assertions. But there is no occasion, of course, upon this Rule 12 metion without affidavits, to treat with such speculations.

The motion is denied. So ordered.

Dated: New York, New York September 26, 1969

Mauric Flaubel

NITED STATES DISTRICT COURT OUTHERN DISTRICT OF NEW YORK

Civil Action

-against-ELEN B. DWYER,

Plaintiff

ORT SCHMIEDER,

Defendant.

NOTICE OF MOTION

OWEN & TURCHIN
Literary for Defendant
Office and Post Office Address, Telephe
60 East 42nd Street

forough of Manhattan New York, N. MO 1-0420

Venney(s) for

is hereby admitted.

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inorney(s) for

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DEFENDANT'S MOTION FOR SUBSTITUTION OF PARTIES AND SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

---X

KURT SCHMIEDER,

Plaintiff,

-against-

NOTICE OF MOTION

HELEN B. DWYER,

Index No. 69 Civ. 1939

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Richard Owen, Esq., sworn to March 31, 1971, plaintiff's deposition signed by Richard Owen, Esq., as the officer administering the oath, and the pleadings herein, the defendant will move this Court at a Civil Motion Term thereof to be held in Room 506, United States Courthouse, Foley Square, New York, New York on April 20th, 1971, at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel may be heard for (1) an order pursuant to Rule 25(a) of the Federal Rules of Civil Procedure, substituting Louis H. Hall, Jr., as Preliminary Executor of the Estate of Helen B. Dwyer, deceased, for Helen B. Dwyer, individually, as the defendant herein; and (2) for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint herein on the ground there are no issues of fact and as a matter of law plaintiff is not entitled to the relief sought herein, and for such other and

further relief as to the Court may seem proper.

Dated: New York, March 31, 1971.

Yours, etc.,

OWEN & TURCHIN

By:

A Member of the Firm Attorneys for Defendant Office & P.O. Address 60 East 42nd Street New York, New York 10017

MO-1-0420

TO:

WERNER GALLESKI, Esq. Attorney for Plaintiff 70 Pine Street New York, New York 10005

| UNITED STATES DISTRICT COUR | T |
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| SOUTHERN DISTRICT OF NEW YOR | X |
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| | <i>x</i> |
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| KURT SCHMIEDER, | : |
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| HELEN B. DWYER, | • |
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| STATE OF NEW YORK) | |
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COUNTY OF NEW YORK)

Richard Owen, being duly sworn, deposes and says:

I am a partner in the firm of Owen & Turchit. I was retained by Mrs. Dwyer during her lifetime to defend against this action brought by Mr. Schmieder and after her death on May 16, 1970, I was retained by the preliminary executor, Louis H. Hall, Jr.

I make this affidavit in support of the motion by the defendant herein to change the caption of this action to substitute the Estate of Helen B. Dwyer, deceased, and in support of the Estate's motion for summary judgment herein.

Mrs. Dwyer died on May 16, 1970 and her Will dated September 9, 1966, has been offered for probate in the Surrogate's Court, New York County, Index No. 4663/70. During the pendency of that proceeding Louis H. Hall, Jr., who is named Executor under the Will, was granted preliminary letters testamentary on August 6, 1970, by Surrogate Samuel Silverman and his bond was duly posted in the amount of \$10,000.00.

Plaintiff's attorney has been aware as a matter of 643a record of Mrs. Dwyer's death, at least since September 23, 1970, when he sought to intervene in the probate proceeding in the New York County Surrogate's Court.

It is therefore submitted that the caption of this action should be changed. In place of Helen B. Dwyer as defendant there should be substituted Louis H. Hall Jr. as Preliminary Executor under the Last Will and Testament of Helen B. Dwyer, deceased, to reflect the true state of the record.

In support of the Estate of Helen B. Dwyer's motion, pursuant to the Federal Rules of Civil Procedure, Rule 56, for judgment dismissing the complaint herein on the ground there are no issues of fact, there is submitted to the Court the deposition of plaintiff Kurt Schmieder.

To accommodate plaintiff, who is an elderly gentleman residing in the Federal Republic of Germany, I conducted his deposition at Frankfurt-am-Main, Germany on February 9, 1970. At that time it was agreed that I, as a Notary Public, would administer the oath to plaintiff and the necessary interpreter. The deposition was taken on a tape recorder, and upon my return I had the tape transcribed. On April 8, 1970, I mailed three copies of the transcript to plaintiff's attorney for execution by plaintiff. Although I have repeatedly requested the executed copy from plaintiff's attorney, and I am informed that it has already been executed and is in his attorney's possession, to date it has not been furnished me. Plaintiff's attorney takes the position that I am not entitled to it on the claim that I do not represent the Estate of Helen B. Dwyer in this action.

However, as plaintiff's attorney is fully aware, I am the attorney of record for the Estate in the Surrogate's Court proceeding in which I have been an adversary on his motion to intervene and over the past approximately six months, many papers from both sides have been served and filed all indicating my position as attorney for the estate. As a result of plaintiff's refusal to furnish me with his deposition, I have signed the deposition as the officer administering the oath pursuant to Rule 30(e) of the Federal Rules of Civil Procedure.

During the taking of the deposition many documents were marked as Exhibits which I am annexing hereto in support of defendant's motion. These are Exhibits A, B, C, D, E and G.

In addition, I am annexing hereto as Exhibit "1", a letter from Mr. William Graupner to Mr. Louis Hall Sr. dated June 11, 1947. I have read the sworn statements of Herman Graupner, Louis Hall, Sr. and Mrs. Dwyer before the government and without quoting at length, can state that they all aver that the gift was absolute and without conditions.

It is submitted that as set forth in the Memorandum of Law submitted herewith and the annexed exhibits, there is no genuine issue of fact and that as a matter of law the complaint herein should be dismissed.

Richard Owen

Sworn to before me this 31st day of March, 1971

What I Turden

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - LETTER TO HELEN B. DWYER DATED MARCH 15, 1938

Viale S. Salvatore 12, Lugano, Switzerland March 15, 1938.

Mrs. Helen B. Dwyer, 185 Broadway, New York dity.

Dear Mrs. Dwyer:

I am the owner of the outstanding stock of Stoneleight Corporation, a corporation organization under the laws of Delaware, consisting of 500 shares. Stoneleigh Corporation is also indebted to me in the total amount of \$23,294.45 for cash advanced by me to it. I wish to make an absolute gift to you of both my stock in the said corporation and of my claims for advances against it, subject, however, to the payment by you of all taxes which may properly be chargeable to me under the laws of the United States of America, such as gift taxes or otherwise. I am instructing my attorneys, Mesers. Putney, Twombly & Hall, to cause the transfer of the said stock into your name and have instructed the said corporation to place the nonies due me on account for advances at your disposal, subject to the application of the said monies to whatever extent may be necessary to the payment of any and all gift taxes which may accrue pursuant to the laws of the United States of America. My said attorneys will make delivery to you of this property in my behalf, and you are to accept it as an absolute gift to do with as you may see fit.

Very truly yours,

Lenny Bodine un.

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EXHIBIT B - LETTER TO STONELEIGH CORP, DATED MARCH 15, 1938

Viale S. Salvatore 12, Lugano, Switzerland

March 15, 1938.

Stoneleigh Corporation, 900 Market Street, Wilmington, Delaware.

Gentlemen:

I am the holder of your entire issued and outstanding capital stock consisting of 500 shares thereof. I am also the holder of a claim against you for monies advanced in account current, as follows:

| April
Nov.
March
Jan. | 12, | 1936
1937 | 1,797.45
5,000.00
7,497.00 |
|--------------------------------|-----|--------------|----------------------------------|
| van. | IL, | 1999 | 9,000.00 |

I am making a gift of my stock, and of all my said claims for monies advanced, to Mrs. Helen B. Dwyer, 165 Broadway, New York City. You will please note the ownership of Mrs. Dwyer of all my claims for advances against your company, and make payment thereof according to her instructions.

Very truly yours,

Venny Bachuseur

EXHIBIT C - LETTER TO PUTNEY, TWOMBLY & HALL DATED MARCH 15, 1938

Viale S. Salvatore 12 Lugano, Ewitzerland

March 15 , 1938

time. Eubney, Twombly & Hall,

tachen:

I Comire to give as an outright and absolute gift to Hrs. Dayer my holdings of stock of Stoneleigh Corporation and is for advances to said corporation in the amount of \$25,294.43. The cold serporation to place the monies represented . C. vances at the disposal of Mrs. Dywer. I authorize, empower I Chapas you, caploying the power of attorney which I have delivered 1 103 202 that purpose, to cause my said stock in Stoneleigh Corporaon to be transferred into the name of Mrs. Dayer, and certificates mercy followed to her absolutely, subject, however, to the payment I all transfer and gift taxes which may be or become payable by rea-3 02 crob gift and transfer. You are to require that out of the There's co transferred sufficient be reserved and applied to the "ant in full of all such transfer and gift taxes, and you are morrand, directed and empowered, in my behalf, to make and file all in rolling, reports, etc., as may be required under the laws of the 1004 01 1000 in connection with such gift and transfer, and to make, 130000 and Coliver, as my attorneys in fact, all such instruments and underings as may be necessary to carry out the transfer of my id property to Mrs. Dayer.

Very truly yours,

lung Bocherace

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EXHIBIT D - AGREEMENT SIGNED BY PLAINTIFF

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Erklaerung: che

Unterzeichneter bestaetigt literalt, dass es von ihm verstanden ist, dass die Schenkung von Frau Bochmann's Guthaber bei der New York Trust Co. und der dort hinterlegten Wertpapiere an Mrs. Dwyer eine freiwillige, absolute und unwiderrufliche Schenkung ist, ohne jede Gegenverpflichtung von Mrs. Dwyer.

Meerane (Sachsen), den 4. Ja: 1943

Crimimitschan

Bolomn Attestation:

The undersigned confirms herewith that it is understood by him that the gift of Mrs. Boohmann's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dayer is a voluntary, absolute and irrevocable gift, without any obligation of Mrs. Dayer.

(Signed) Kurt Schmieder

Meerane (Bachsen)

June 1, 1948

As witness: Dr. Alfred Lindner

EXHIBIT' 1 - LETTER TO LOUIS H. HALL DATED JUNE 11, 1947

1170 Fifth Avenue New York 29, N.Y.

June 11, 1947

Hr. Louis H. Egll 203 Droadway Hew York o, H.Y.

Dar Hr. Hall:

Then, prior to the gift by Jernie Bochmann to Mrs. Dayer, Mr. Cohuleder told me that Mrs. Dochmann desired to make the girt and surrender all interest in the property, I asked him for something in writing chowing his approval of the proposed transaction. I mentioned to him that boomse I was taking the responsibility of arrenging to have the natter done in legal form I wanted something in writing for use in the event that at any time in the future any medicar of the foully might question the transeotion. Ils thoreupon wrote and gave to me the memorandum in his handwriting union I have delivered to you and or which a free translation in English would be a follows:

"I approve of the arrangements for my sisterin-law which we have discussed.

The arrangements which we had discussed, and to which he referred in this note, were those for making an absolute gift by Lrs. Boshmann after I had informed him that thet was the only basis on which you could act in the transaction.

Very truly yours,

| UNITED STATES DISTRICT SOUTHERN DISTRICT OF N | | |
|---|------------|---------------------------|
| | | -X |
| KURT SCHMIEDER, | | : |
| | Plaintiff, | : |
| -against- | | Index No.
69 Civ. 1939 |
| HELEN B. DWYER, | Defendant. | : |
| | | :
-X |

MEMORANDUM OF LAW ON BEHALF OF LOUIS
H. HALL, JR. AS PRELIMINARY EXECUTOR
OF THE LAST WILL AND TESTAMENT OF
HELEN B. DWYER, DECEASED

INTRODUCTION

Defendant, Estate of Helen B. Dwyer, moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that the facts herein demonstrate there is no genuine issue as to any material fact and that the Estate of Helen B. Dwyer is, therefore, entitled to judgment dismissing the complaint as a matter of law.

654a

This action was commenced on May 16, 1969, by plaintiff a citizen of the Federal Republic of West Germany. The complaint alleges that Mrs. Dwyer had a "moral obligation" to give back to plaintiff certain cash and securities which he, while a citizen and resident of Nazi Germany in 1938, gave to her in the United States of America as a gift concededly "impregnable at law" to avoid confiscation or more serious problems with German authorities.

I. THE FACTS

The facts surrounding this gift are as follows.

Plaintiff, living in Germany, had stocks and bonds in

this country held for him by the then New York Trust Company,

(3).* In 1934 in an effort to protect himself and his

assets from the Nazis, he transferred their ownscship to

his sister-in-law, Mrs. Jennie Bochmann,** a resident of

Switzerland (3) while he continued to receive the dividend

income (3-4). When this no longer seemed to afford adequate

protection, through William Graupner*** a friend of his in

^{*} References are to pages in plaintiff's examination before trial.

^{**} Mrs. Bochmann is dead (5).

^{***} Mr. Graupner died in 1954 (17).

the United States, he asked Louis Hall, Sr.* a partner in the New York law firm of Putney, Twombly & Hall, to create Stoneleigh Corporation in the State of Delaware to own and manage most of these securities, then of the approximate value of \$200.000.00 (43,61). All of the 500 shares of Stoneleigh were then issued into the name of plaintiff's sister-in-law, Mrs. Bochmann (6-6A). As the situation in Nazi Germany grew worse plaintiff feared that these securities might still be traced to him (44). German law at that time, The Act Concerning Economic Sabotage of December 1, 1936, provided the death penalty and confiscation of property for German citizens who concealed their property held in another country. At the same time Mrs. Bochmann feared that her nominal ownership might cause her trouble with the Swiss authorities (8, 43-4) and of course there was the concern that the Nazis would alm overrun Switzerland so she wanted no further part in it. Plaintiff finally decided that the only way to avoid these risks was to eliminate all ties of ownership to this property. After discussing the matter with his friend Mr. Graupner who conferred with Mr. Hall, Sr., as to the mechanics and a possible donee, Schmieder met Mr. Hall Sr. in Leipzig Germany in 1938, who told him that Mrs. Dwyer, his secretary,

^{*} Mr. Hall Sr. died in 1949.

had agreed to accept the gift of the property (10). This was the only time he ever discussed this gift with Mr. Hall, (10, 46, 48) and plaintiff never spoke to, met with, nor corresponded with Mrs. Dwyer (38).

In March 1938 all 500 shares of Stoneleigh Corporation were transferred to Mrs. Dwyer (12, 17, Defendant Ex. E) by Mrs. Bochmann, This transfer was effected by three letters from Mrs. Bochmann in Switzerland: to Mrs. Dwyer (Defendant Ex. A), to Stoneleigh Corporation (Defendant Ex. B), and to Mr. Hall's law firm, Putney, Twombly & Hall (Defendant Ex. C), setting forth her desire that an unconditional gift be made of all these shares to Mrs. Dwyer This was all done with plaintiff's specific knowledge (12),/by a brief writing by plaintiff given to Mr. Graupner, at the latter's house in Germany at the time of the making of the gift, saying that he was "in agreement with the discussed arrangement for my sister-in-law" (12-14, Defendant Ex.D). This writing, albeit brief because of the risks of it falling into Nazi hands (13-14), was apparently demanded by Graupner for his own protection as evidence of his authority to effect the gift. See Exhibit 1 to the moving affidavit of Richard Owen Esq. which is Mr.

Graupner's letter to Mr. Hall dated June 11, 1947, forwarding plaintiff's said statement, wherein Mr. Graupner stated:

"The arrangements which we had discussed, and to which he referred in this note, were those for making an absolute gift by Mrs. Bochmann after I had informed him that that was the only basis on which you could act in the transaction."

During the war years the United States Treasury "blocked" these assets and at various times Mrs. Dwyer was compelled to obtain licenses for the release of monies for her use. In 1948, the United States government seized Mrs. Dwyer's securities under the Alien Property Act, and she commenced an action against the Alien Property Office in 1949 in the United States District Court, District of Columbia, for the return of her property (20,24). For specific submission to the Federal Court in that action, plaintiff signed a statement under oath in Germany on June 1, 1948, stating that the gift made to Mrs. Dwyer was "voluntary absolute and irrevocable... [and] without any obligation of Mrs. Dwyer." (Defendant Ex. G). Mrs. Dwyer's action was thereafter settled and she received 55% of the value of the property seized by the government (35-6).

In 1955 plaintiff himself asserted a claim for certain property seized and held by the Alien Property Office (Claim No. 63692). This claim was denied in June 1962.

Finally plaintiff commenced this action.

It is submitted it should be dismissed as a matter of law because as the foregoing facts demonstrate, this was an unconditional and absolute gift.

PLAINTIFF INTENDED TO AND DID MAKE AN ABSOLUTE AND UNCONDITIONAL GIFT TO MRS. DWYER

Plaintiff in his complaint and in his deposition acknowledges, as he must in the face of the many documents, that he knew, understood he was making and intended to make an absolute gift of this property to Mrs. Dwyer.

This was his intent at the time of the gift and was reaffirmed in his June 1948 statement. Nevertheless over 30 years later he seeks a return of the property claiming that although he intended to and did make an absolute gift, impregnable at law, there was a moral obligation (Complaint, paragraph 6) to return the property. The New York law on

this point is clear.* A gift, if absolute at the time made, is irrevocable and the donor has no right to its return. Weigert v. Schlesinger, 150 App. Div. 765 (2nd Dep't 1912), aff'd 210 N.Y. 573 (1914); Manacher v. Sterling Nat'l. Bank, 4 Misc. 2d 1069 (City Ct. N.Y. Cty. 1956). From all the documents and plaintiff's admissions this gift was intended to be and was considered by the donor and donee to be absolute and impregnable at the time it was given. To assert that although absolute the donee was under a moral obligation to return the property is totally contradictory and would obviously mean that every gift, absolute when given, is subject to return if demanded by the donor. See for example, Pershall v. Elliot, 249 N.Y. 183 (1928) and Parsons v. Teller, 188 N.Y. 318 (1907), where it is clear that whatever moral obligation a donee of a substantial gift may feel for the donor is not a sufficient basis for a Court to compel a return of the gift.

In his deposition plaintiff shifted his argument and claimed that his friend Graupner and Hall (not Mrs.

^{*} Since most of the principal actors were New York residents and most of the transactions took place in New York, the law of the State of New York applies. Hazel Bishop Inc. v. Perfemme, Inc., 314 F.2d 399 (2nd Cir. 1963); Auten v. Auten, 308 N.Y. 155 (1954).

Dwyer, with whom he concedes he never communicated in any way) had a verbal "gentlemen's agreement", only articulated with Graupner according to his own testimony. that this property would be returned to him or his family after the war ended (47). In other words plaintiff is claiming that, as contradictory as it seems, although his gift to Mrs. Dwyer was absolute and unconditional, nevertheless Messrs. Hall and Graupner had a "gentlemen's agreement", (it could not even be characterized as a promise which would of course require consideration) that Mrs. Dwyer was simply to hold the property for him until the war was over and then return it to him.

Not only is any such testimony by plaintiff inadmissible, but in any event it is totally rebutted by every single document in the case.

agreement of any kind with plaintiff: plaintiff and she never communicated in any way whatsoever, and Hall and Graupner, even according to plaintiff's testimony, never said anything to even intimate that Mrs. Dwyer asked them to enter into any agreements on her part. Therefore, any alleged agreement between plaintiff and Hall and Graupner,

the former plaintiff's attorney at the time and the latter plaintiff's friend, would in no way be binding on Mrs.

Dwyer.* See for example Scott v. Palmer, 157 Misc. 133

(Sup. Ct. Madison Cty. 1935), aff'd, 246 App. Div. 379 (3rd Dep't 1936), aff'd, 273 N.Y. 471 (1936).

Such testimony would also be inadmissible under the so-called dead man's statute, C.P.L.R. §4519.**

Plaintiff, obviously interested in the event, is offering his testimony against the deceased Mrs. Dwyer whose interest, according to plaintiff's argument, is derived from the deceased Messrs. Hall and Graupner.

See for example Rosseau v. Rouss, 180 N.Y. 116

(1904) where a wife was held incompetent to testify as
to a claimed oral agreement with the deceased putative
father that he would give \$100,000 to their son. The son's
interest was held to be derived from the mother because if

^{*} The assertion in the complaint that some promise was made to induce the June 1, 1948 statement upon exploration had no factual support since plaintiff on his deposition specifically stated that at the time he executed the statement he was told only that Mr. Graupner had sent the statement for his signature (24).

^{**} New York law would apply on this issue. See for example Wright v. Wilson, 154 F.2d 616 (3rd Cir. 1946), cert. denied, 329 U.S. 743 (1946).

any consideration existed for the father's promise it had to come from the mother. This is a direct analogy to the instant facts, since plaintiff asserts that the statements by Messrs. Hall and Graupner were in effect the consideration to him for giving the property to Mrs. Dwyer and thus Mrs. Dwyer's interest was derived from Hall and Graupner. Reaching similar results are Matter of Browning, 280 N.Y. 584 (1939); Croker v. New York Trust Co., 245 N.Y. 17 (1927); Matter of Cassola, 183 Misc. 66 (Surr. Ct. N.Y. Cty. 1944). This rule necessarily must apply whether or not plaintiff wants to term the asserted statements of Messrs. Hall and Graupner consideration or a gentlemen's agreement or anything else. If the statements can't be testified to as consideration, they certainly can't be testified to as anything less.

THE FACTS ESTABLISH THIS WAS AN UNCONDITIONAL GIFT

Furthermore, as a factual matter, the falaciousness of plaintiff's argument is readily apparent.

Contrary to his claim, plaintiff's intent to

make an <u>absolute gift</u> without any qualification or limita
tion is crystal-clear from the following documents: (1) the

three Jennie Bochmann letters, which plaintiff knew about and authorized, stating the gift to Mrs. Dwyer was absolute and without conditions (Exs. A-C); (2) plaintiff's letter to Graupner stating he agreed with the Jennie Bochmann arrangements for an absolute gift, again without qualification, to Mrs. Dwyer (Ex. D); (3) his own written statement under oath in June 1948 that the gift to Mrs. Dwyer was absolute and without any strings. The language is clear in all these documents that Mrs. Dwyer was to get an absolute gift with no qualifications or strings attached. Not only is there no mention at all of any return of the property but the documents repeatedly refer to the absolute nature of the gift.

The facts surrounding these documents similarly deconstrate the gift was unconditional. An absolute gift was the only sure way for plaintiff to eliminate all ties to the property and protect himself from the Nazis. If, in 1948 plaintiff felt he was entitled to a return of this property, the Nazi regime was then gone, and he could not only have asserted any claimed right to the property he thought he had, but at least he could have

declined to execute the written statement he made under oath saying it was an absolute gift and he had no interest in the property at all. He admitted knowing the statement was to be submitted to a Federal Judge in the action brought by Mrs. Dwyer against the Hien Property Office for this very property. This, it is submitted, is conclusive proof that the gift was absolute.* He can hardly now claim before a United States Judge in this District that a sworn statement he made to a United States Judge in 1948 was false.

It is vital to both parties that that gift be impregnable at law. Consideration had to be given not only to the German authorities but also to the Alien Property Office which of course might eventually seize enemy alien property as it had done in World War I. Under the law the only way to avoid seizure in this country was for the enemy alien to similarly sever al! ties to the property by making an absolute gift. See for example, Miller v. Herzfeld, 4 F.2d 355 (3rd Cir. 1925). From Mrs. Dwyer's point of view the gift had to be absolute so she would not be charged with "cloaking" the assets of an alien. Therefore,

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^{*} The significance of plaintiff's statement is conceded by plaintiff's attorney in his affirmation, dated December 11, 1970, in support of his motion to intervene in the probate proceedings, Tetate of Helen B. Dwyer, No. 4663/70, Surrogate's Court, New You... County, where at p.6 he stated: "The statement [June 1, 1948] contained an acknowledgement of claimant's position that he had relinquished all rights to the property in question."

plaintiff's clear intent, as well as Mrs. Dwyer's, was to arrive at a solution which would create an absolute gift. Plaintiff's assertion that Messrs. Hall and Graupner had a gentlemen's agreement with him to get the property back from Mrs. Dwyer if plaintiff would give it to her assumes that both Hall, a prominent New York attorney, and Graupner, a respected business executive who was his client and was close to German affairs maintaining a home there, would be willing to perjure themselves before the United States Government to the effect that the gift to Mrs. Dwyer was absolute knowing it was not, and treasonously defraud the United States, and why would Mrs. Dwyer lie and then give the property back? In fact all three eventually were required to give statements under oath to the United States Government and they all stated the gift was absolute and unconditionally given. The law certainly requires more proc! than that offered by plaintiff here before such an unsupported claim should be permitted, particularly where Hall and Graupner, the other parties to the alleged gentlemen's agreement had died before his belated action was commenced. See for example the condemnation of an analogous claim in Rosseau v. Rouss, 180 N.Y. 116,121 (1904):

"We have repeatedly held that such a contract must not only be certain and definite and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence....As 'such contracts are easily fabricated and hard to disprove, because the sole contacting party on one side is always dead when the question arises', we have declared that they 'should be writing, and the writing should be produced, or, if even based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses'."

There can be no question but that as a matter of law there was an absolute and unconditional gift to Mrs.

Dwyer.

UNDER THE EQUITABLE DOCTRINES OF UNCLEAN HANDS AND LACHES PLAINTIFF HAS NO RIGHT TO SEEK EQUITY

Plaintiff in asserting his claim is of course compelled to disavow his statement under oath in June 1, 1948 on behalf of Helen B. Dwyer's lawsuit against the Alien Property Office wherein he stated the gift was unconditional and made with no obligation on Mrs. Dwyer's part at all. He comes to this United States Court and says that that statement was false although he knew it was made for submission to another United States Court. Not only does he claim he lied to keep the United States Government from

seizing the property but he also claims he made an illegal agreement, with Messrs. Hall and Graupner, that M. 3.

Dwyer would hold this property for him until after the war, in defiance of the Alien Property Office and against Federal Law. Under the doctrine of unclean hands no Court of equity can possibly recognize such a claim. Seagirt Realty Corp. v. Chazanof, 13 N.Y.2d 282 (1963); Levy v. Braverman, 24 A.D.2d 430 (1st Dep't 1965) (mem. no. 7); Hang v. Hang, 283 App. Div. 1107 (2nd Dep't 1954) (mem. no. 2). And see particularly the recent case of Lowe v. Quinn, 27 N.Y.2d 397 (1971) where the New York Court of Appeals held that plaintiff could not recover a diamond engagement ring he had given his girl friend while he was married on the ground such an agreement was void as against public policy.

plaintiff's laches. This gift was made in 1938 and this action was commenced over thirty years later on May 16, 1969, the end of and twenty-four years after/the war when plaintiff was first free to assert it (20). Furthermore, after plaintiff's deposition was held in Germany in February, 1970, the case has thereafter been dormant in that plaintiff even up

The fact that Mrs.Dwyer relied on the validity of this gift is manifestly clear and was known to plaintiff. Mrs. Dwyer, and Messrs. Hall and Graupner gave testimony under oath that it was an absolute gift. Mrs. Dwyer made several applications for unblocking of portions of these monies by the United States Treasury Department. Obviously considerable expense, time and energy was expended by Mrs. Dwyer in reliance on the unalterability of the gift to her.

Plaintiff in fact recognized the baselessness of his present claim against Mrs. Dwyer in that in 1955, he made a claim against the United States Government for property seized by the Alien Property Office and it was denied in 1962. It was seven years after that denial that he commenced an action against Mrs. Dwyer, thus evidencing his own belief that his gift to her was unconditional and absolute.

It is, therefore, submitted that from all the foregoing, summary judgment should be granted dismissing the complaint herein.

Respectfully submitted

OWEN & TURCHIN Attorneys for Preliminary Executor, Louis H. Hall, Jr.

Of Counsel

Richard Owen Morton J. Turchin

AFFIDAVIT OF WERNER GALLESKI IN OPPOSITION TO MOTION

| UNITED STATES DISTRICT COURT | |
|-------------------------------|--|
| SOUTHERN DISTRICT OF NEW YORK | |
| | |
| KURT SCHMIEDER | |

Plaintiff.

- against -

AFFIDAVIT IN OPPOSITION

HELEN B. DWYER.

Defendant.

STATE OF NEW YORK)

(COUNTY OF NEW YORK)

WERNER GALLESKI, being duly sworn deposes and says:

I am the attorney for KURT SCHMIEDER the plaintiff herein who is a citizen of, and resides in, the Federal Republic of Germany. By reason of numerous personal conferences with the plaintiff I am thoroughly familiar with the facts and circumstances herein. I make this affidavit in opposition to the motion of LOUIS H. HALL JR. in his capacity as preliminary executor of the Last Will and Testament of HELEN B.DWYER, Deceased, for his substitution as defendant in the present action in the place and stead of HELEN B.DWYER, Deceased, and for summary judgment.

I. The Motion for Substitution

I am opposing the motion for substitution primarily on the ground that the status of the movant as preliminary executor of the estate of the deceased defendant herein is tenuous and nominal only. He cannot be expected to serve as such preliminary executor for any further length of time.

670a

Three motions have been brought by plaintiff and statutory distributees of the deceased defendant in the New York County Surrogate's Court for revocation of the preliminary letters or in the alternative for an increase of the bond up to \$850,000. With all due respect to the discretionary powers of the Hon. Surrogate and simply on the basis of the compelling facts known to me, I am of the opinion that the letters must be revoked. I also expect that in the event of a denial of a revocation of letters and/an order requiring a substantial bond the movant will not post such bond.

The said three motions were argued in the Surrogate's Court on April 16, 1971. The preliminary executor got time to file his papers by April 20. The necessity of a substantial increased bond beyond the \$100,000 presently posted follows from the viewpoint of the estate administration by reason of the establishment by the deceased defendant of an inter vivos trust in Massachussetts (containing an overwhelming part of the funds transferred by plaintiff to the deceased defendant) which the statutory distributees attack because of undue influence. The same attack is leveled by the statutory distributees against the will which the preliminary executor has offered for probate. The principal beneficiaries both under will and trust are the preliminary executor individually and his two sisters. The reasons advanced by the statutory distributees in support of their motions follow from their memorandam submitted in the Surrogate's Court as per Exhibits 1 a and 1 b attached hereto. Plaintiff's participation in the motion procedure rests on his position that he, although disinterested in the grant or denial of probate, is acutely interested in the identity of the estate fiduciary who administers the funds subject to the present action for impression of a constructive trust. Since the substitution of the movant in place of the acceased defendant is a matter of discretion to be decided with a view to the furtherance of the orderly administration of justice, it is respectfully submitted that the substitution of a fiduciary whose continued tenure is highly improbable, should not be directed as ong as the aforementioned proceedings in the Surrogate's Court are pending.

It is further urged that such a delay of the decision concerning substitution works no hardship whatsoever against the movant because he was content to keep plaintiff's action dormant from May 16, 1970 when the defendant died. Movant did not file any suggestion of death and rather went ahead with proceedings for the probate of the will of the deceased defendant. In an affidavit required from him by the Surrogate to explain his double role as attorney - employer of the decedent and beneficiary under her will he left the matter of the transfer of funds from plaintiff unmentioned.

Plaintiff's inaction, after he got notice of defendant's death, was dictated by the discovery that at least five sixths of the property subject to constructive trust had, prior to the commencement of the action herein, been removed by the deceased defendant from the State of New York and brought into the aforementioned inter vivos Massachussetts trust for the benefit of the movant and his two sisters. Plaintiff therefore concentrated upon the preparation of an action in the U.S. District Court for the District of Massachussetts at Boston where a complaint for recovery of the trust fund, and for other relief, was filed on April 15, 1971.

Financially and practically seen, the Massachussetts action relegates the present action to a secondary level inasmuch as the risk of unlawful distribution loomed more menacing in Boston than in New York, and as, in plaintiff's calculation, the New York probate estate will anyhow be insufficient to cover plaintiff's in personam rights against the decedent for damages and deficiencies in connection with the fraud perpetrated upon him. It stands to reason that the plaintiff would, if the establishment of the trust had not been fraudulently concealed from him, have brought the Massachussetts action in the first place.

The second ground for my opposition is the fact, pursuant to an investigation conducted by me in 1970, plantiff is eligible for return of vested property under Section 32(a) of the Trading with the Enemy Act as amended. I am hesitant in taking steps toward making the Attorney General an additional defendant with a supplemental prayer for reformation of a settlement entered into by him and the late HELEN B. DWYER regarding plaintiff's property with participation of movant as defendant. It is obvious that he has a conflicting interest as individual in view of the responsibility cast upon him by the statutory distributees.

WHEREFORE, deponent respectfully prays that the application of the preliminary executor for substitution in the place of the deceased defendant be denied peremptorily, or in the alternative without prejudice to a renewal of the application after disposition of the aforementioned motions presently pending in the New York County Surrogate's Court.

II. The Purported Motion for Summary Judgment.

The motion is jurisdictionally defective because Rule 56 does not entitle a non-party to move for summary judgment.

Still, because of the outward appearance of a motion for summary judgment having been made, it may be stated that the motion papers read like an attempt to reargue a motion made by the deceased defendant for dismissal of the complaint and denied by this Court (Frankel, J.) on or about September 26, 1969. There it became the law of this case that the plaintiff's appeal is to the conscience of equity, invokes principles that are intrinsically open-ended and adaptable to the infinite varieties of conceivable fiduciary relationships. But movant argues in the same vein as the deceased defendant did on the basis of purported proof of an absolute transfer or gift as well as on the alleged absence of an understanding concerning moral duties. The basic misconception in movant's approach is the failure to recognize ethical principles as an automatic source of power. Even an absolute and forever irrevocable gift, if it is unconscionable invokes the help of equity for the benefit of the victimized party, and this effect cannot be beclouded or frustrated by face-saving language and legalistic sacrifice put into the mouths of participating persons.

Furthermore movant does not at all seem to account for the impressions and expectations raised in a German national, in distress under draconic first Nazi and then Communist totalitarianism, when he receives legal advice from the senior partner of a reputable Wall Street law firm. The last he expects is that in the process of the consultations

he would loose the property, which he seeks to preserve, to his counsel's secretary and ultimately to his counsel's family.

But even going one step further and assuming without conceding for purposes of argument that plaintiff in his distress really saw no way out other than abandoning every chance of future recovery on moral grounds, it would still - entirely regardless of papers signed and words spoken - be unconscionable for the recipients to keep the unjust enrichment which developed upon them in the exercise of their profession and to the detriment of the innocent party who relied on their professional services without benefit of independent counsel.

In fact, however, the exhibits adduced by movant do not at all exclude the reservation of moral expectancies for plaintiff. Exhibit 1 attached to the moving affidavit herein purports to be a letter addressed by a friend of plaintiff to LOUIS H. HALL SR. under date of June 11, 1947. The letter was typed in the style frequently appearing in this case on letters originating from LOUIS H. HALL Sr. 's office. Even if we disregard that the letter obviously was signed pursuant to request at the very time when the late defendant's action against the Attorney General for release of plaintiff's vested property was gaining shape, the letter itself remains entirely open-ended in favor of plaintiff. The last sentence denotes that LOUIS H. HALL SR. had informed plaintiff through the writer than an absolute gift was the only basis on which he "could act in the transaction".

The said information necessarily implied that the attorney would somehow "act" in the interest of his client. In addition the reference to an "arrangement" in the letter further tends to indicate that more than an "absolute gift" was involved. If plaintiff's only concern had been to get rid of the property, the International Red Cross and innumerable other organizations serving worthy charitable or other purposes would - without the need of consulting eminent Wall Street counsel - have been available for really final and permanent receipt of the property with all safeguards for plaintiff's anonymity. This in itself indicates that an arrangement which involved the advice of eminent Wall Street counsel must have left more than a mere giving away and must have raised expectations of plaintiff for future recourse under moral principles inspite of the impregnability of the transaction at law. All exhibits produced herein are consistent with plaintiff's description of the true facts and movant's version is contradicted by influences arising from equity.

Although in my opinion no valid motion for summary judgment has been brought, I respectfully urge the Court to consider the resulting merits of plaintiff's action herein for its exercise of discretion in granting plaintiff's request that his present action be kept dormant pending developments in the Massachussetts action and that an implied stay be accomplished by denial of the motion for substitution as per I hereinabove.

III. The Unsigned, Incomplete and Incorrect Copy of a Deposition.

The purported motion for summary judgment tries to use a "deposition" which has, in my respectful submission, erroneously been docketed in this Court. The "deposition" is unsigned, and incorrect in more than 30 places (discounting merely perfunctory mistakes). There is an open gap on page 48. It does not contain a list of exhibits, and not all exhibits can be identified by analysis of the purported text.

The erroneous filing of the "deposition" was enduced by a certificate of RICHARD OWEN, ESQ., dated April 2, 1971, which among several defects has an incurable defect which appears on the face of the certificate.

The certificate fails to show that the witness was duly sworn by the officer making the certification under Rule 30 (e) and (f). In the preamble preceding the body of the certification it is merely said that Mr.OWEN "by express stipulation of the parties" was an officer administering the oath in the deposition herein. Lateron, in the body of the certification, it is said that the witness "was previously sworn" (which may refer to the swearing of the witness before a U.S. consul).

I am informed and do verily believe that Mr. OWEN is not a person empowered to administer an oath under the laws of the Federal Republic of Germany, where the deposition was taken. It must therefore be assumed that the omission of a certification, that the witness was duly sworn by the officer making the certificate under Rule 30 (e)and(f) was intentional because no oath could duly be taken by Mr. OWEN in Frankfurt / Main.

Consequently, it is unnecessary to go into the incorrectness and incompleteness of the purported record filed or into Mr.OWEN's allegations concerning refusal of delivery of an executed copy. The certificate significally fails to mention that HELEN B. DWYER deceased on May 16, 1970. As of December 2, 1971, Mr.OWEN still describes himself "attorney for the defendant". My refusal to deliver any papers in the present matter was based upon the lapse of Mr.OWEN's authority at the death of HELEN B.DWYER.

By reason of the lack of proper certification in accordance with Rule 30 (e) and (f), the item actually docketed does not constitute a deposition which would be deemed valid without a successful motion to suppress it. We are rather dealing with an accidental docketing of a matter foreign to the records of this Court.

I hereby humbly pray that the said erroneous item be administratively expunged from the record.

WERNER GALLESKI

Sworn to before me this 17th day of April, 1971.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

:

KURT SCHMIEDER,

Plaintiff,

Plaintiff,

Index No.

- against
: 69 Civ. 1939

HELEN B. DWYER,

Defendant.

MEMORANDUM OF LAW IN OPPOSITION
TO MOTION OF PRELIMINARY EXECUTOR
OF ESTATE OF DECEASED DEFENDANT
FOR SUBSTITUTION AND SUMMARY
JUDGMENT.

Plaintiff opposes the substitution on the grounds that movant's nominal position as preliminary executor is unlikely to continue for long and that a conflict of his fiduciary interests with his individual interests is prejudical to plaintiff.

Plaintiff raises a jurisdictional defense to the motion for summary judgment on the ground that movant is not a party to the present action.

Point I: The decision on substitution is discretionary.

The wording of Rule 25 (a)(1) indicates that "the Court may order substitution" emphasis supplied.

The discretionary character of the Court's decision herein has been confirmed by the U.S. Supreme Court in Anderson v. Yungkau (1947) 329 US 482, 485. The said case is particularly applicable to the present situation because it considers the probability of an impending expiration of the fiduciary office of an executor. Where the settlement and distribution of the estate was already far advanced so that a discharge of the executor could be expected in the near future, substitution was denied.

The underlying principles were discussed to the same effect in

Vandervelde v. Put & Call Brokers & Dealers Ass'n. (SD NY 1967)

43 FRD 14

In Plaintiff's respectful submission the said doctrine must reasonably be extended to situations of conflict of interest. Here the common interests of the estate of the deceased defendant and of the plaintiff are served by a withholding of substitution. Point II. A non-party is not jurisdictionally entitled to move for summary judgment.

Rule 56 provides for a motion for summary judgment by a party only.

It therefore is respectfully submitted that the motion for summary judgment herein must be denied by reason of its jurisdictional defect.

It is therefore urged that the motions herein be denied.

Respectfully submitted

WERNER GALLESKI Attorney for Plaintiff 70 Pine Street New York, N.Y.10005 OPINION OF MOTLEY, D.J. ENTERED AUGUST 24, 1971 GRANTING SUBSTITUTION AND DENYING SUMMARY JUDGMENT

This is an action by Kurt Schmieder, a citizen of the Federal Republic of Germany, against Helen B. Dwyer, a former New York resident, now deceased, to recover certain properties transferred to her in 1938 pursuant to an alleged "irrevocable and unconditional" gift which plaintiff now seeks to have the court look behind. The essence of plaintiff's claim is that the gift was made to prevent the Mazi regime in Germany, which was in power at the time of the transfer, from using the transferred assets for their own aims. Plaintiff asserts that it was understood among the parties effectuating the transfer, to wit, himself and two United States counsel, William Graupner and Louis Hall, Sr., that such was the purpose of the gift. He claims there was a "gentlemen's agreement" between them to return the property to him at the conclusion of the war. Mrs. Dwyer, an asserted "straw" in the ogrammant and the person to whom the property was transferred, never had any contact with plaintiff, and was at the time of transfer a secretary in the employ of Mr. Hall, Sr.

The following background facts will be helpful to an understanding of the case:

Plaintiff was living in Germany in 1934. He had certain stocks which were being held in trust for him by the New York Trust Company in the United States. At that time, in an effort to protect himself and his assets (having an aggregate value of \$200,000), he transferred their ownership to his sister-in-law, a Swiss national. In or about 1935, plaintiff, feeling that his assets in nomine Jenny Bochmann were no longer safe from discovery by the Nazis, sought the counsel of his friend, William Graupner, a United States citizen, as to what he might do. Graupner, in turn, solicited the legal advice of Louis Hall, Sr., also of the United States (Hall, Sr., and Graupner are now both leceased). Louis Hall, Sr. and Graupner advised plaintiff that he should create a comporation to manage the securities. Plaintiff agreed and on or about January 1, 1936, the Stoneleigh Corporation was set up. All 500 shares of the corporation were issued to Mrs. Bochman in her name. Plaintiff, however, still was fearful that the securities might be traced to him. His fear was well founded in view of the "Act Concerning Economic Sabotage" which had become German law on December 1, 1936. That Act provided for death and confiscation of y operty of German citizens who concealed property in foreign

lands. Mrs. Bochmann was also concerned that her fiominal ownership might cause trouble with Swiss authorities. There was also the fear that Switzerland might be overrun by the Mazis as well. Plaintiff finally decided to eliminate all risk by completely divesting himself of all ownership. After discussions with Graupner, plaintiff met with Louis Hall, Sr. in Leipzig, Germany. Mr. Hall, Sr. told plaintiff that Mrs. Dwyer, Hall Sr.'s secretary, would accept the gift of the property. In March, 1938, all the shares of Stoneleigh Corp. were transferred by Mrs. Bochmann to Mrs. Dwyer by means of three letters - one from Bochmann to Dwyer; one to Hall, Sr.'s firm, setting forth her desire that an unconditional gift be made; one to Stoneleigh Corporation authorizing the transfer. Plaintiff never met with Mrs. Dwyer, but he knew of the transfer arrangements. It is alleged that Louis Hall, Jr., movant here, prepared the documents for the transfer of 1938.

In 1948, the United States, pursuant to the Alien Property Act, seized the securities held by Mrs. Dwyer. She commenced an action against the Alien Property Office in 1949 in the United States District Court for the District of Columbia. At that time plaintiff signed a statement under

"voluntary, absolute, and irrevocable. . .without any obligation of Mrs. Dwyer." In 1951, Mrs. Dwyer entered into a stipulation settling the pendent claim, and she received 55% of the value of the property.

During World War II plaintiff had no communication with anyone in the United States. In 1945, at the war's end, he was sentenced to prisan by the Soviet Military and Occupation authorities for anti-Communist activities.

Following his release plaintiff had conversations with an intermediary sent by Mr. Hall, Gr. and Graupner, and following those discussions the 1948 document referred to above was signed. Shertly after executing the document, plaintiff was reincarcerated by the East German Communist Regime for drimes against the State.

Plaintiff asserts that in 1951 when he finally was released by the East Germans he was advised by a letter from Graupner not to take any action to assert his claim in the action then before the United States District Court (the Dwyer suit). He states that he was reassured that his interests were being protected by Graupner and Messre. Hall, Jr., and Gr.

Following Graupner's death in 1954, plaintiff states he was unable to find hirs. Dwyer until 1969. In 1969, the instant action to impress a constructive trust upon the subject property and for other relief was filed.

Mrs. Dwyer died on May 16, 1969. Plaintiff further alleges that in 1968, Hall, Jr. purporting to act on Dwyer's behalf moved \$60,000 (5/6'ths) of the subject property from New York to Massachusetts. There a trust fund with Dwyer as life beneficiary was set up. Said trust provided that upon Dwyer's death the remainder of the property would be distributed in equal shares to Hall, Jr., and his two sisters, Adolaide McIntosh and Virginia Webb. Hall, Jr. was named executor in Dwyer's will of September 6, 1966.

On August 6, 1970 the Surrogate's Court of New York
County appointed Hall, Jr., executor (preliminary) of Dwyer's
will. Since then charges have been made by distributees of
Dwyer that Hall, Jr. unduly influenced Dwyer (his secretary
after his father's death) to make her will of 1966 out to
him and his two sisters as residuary legatees.

The matter is now before this court on a motion by Louis Hall, Jr., son of the senior Mr. Hall, now deceased, for an order 1) pursuant to Fed. R. Civ. P. 25(a), substituting Louis Hall, Jr., as preliminary executor of the estate

of Helen Dwyer, for Helen Dwyer, individually, named defendant in the action, and 2) pursuant to Fed. R. Civ. P. 56, dismissing the complaint on the ground that there are no disputed issues of fact and defendant's estate is entitled to judgment as a matter of law.

Plaintiff's opposition to the motion consists

essentially of the following: 1) the relationship of Louis
Hell, Jr., to the estate is tenuous since there are presently
"meritorious" actions outstanding in opposition to his

appointment as preliminary executor of Mrs. Dwyer's estate
and, therefore, he should not be substituted as defendant
until those actions to have him removed are determined;

2) since movant is a non-party to the suit whose application
to be substituted as executor should be denied, he cannot
now move for summary judgment; and 3) the motion for summary
judgment should be denied in any event because movant has
failed to dispel the inference of undue influence arising
from the facts and, thus, may not be entitled to a judgment
as a matter of law.

The motion to substitute Louis Hall, Jr. is granted for the reasons set forth below:

The motion for summary judgment is denied on the ground that there are many disputed issues of fact, including

the central issue of whether the girt to him. .wyer was unconditional or subject to an alleged gentlemen's agreement between plaintiff and the lawyers.

The heart of plaintiff's claim in opposition to the substitution of Louis Hall, Jr., is that Louis Hall Jr.'s position as preliminary executor is tenuous in view of motions brought by plaintiff and Nrs. Dwyer's statutory distributees for revocation of the preliminary letters in the New York Surrogate Court. Movant has pointed out, howaver, that plaintiff moved for revocation of the preliminary letters as early as December, 1970, and said motion. was denied on December 17, 1971. The instant motion was filed April 5, 1971. The papers seeking revocation of the preliminary appointment attached to the moving papers by plaintiff included only memoranda in connection with the motion for revocation. During the pendency of the instant motion, that motion, for reargument too, has been denied. (Estate of Helen B. Dwyer, N.Y.L.J. at 18, June 18, 1971). Thus, there is no reason for this court to conclude that Louis Hall, Jr.'s removal as preliminary executor is imminent

Plaintiff next argues that this court should refuse the substitution for the present as a "tactical matter." In particular, plaintiff points out that since the filing of

action in the United States District Court for the District of Massachusetts on April 15, 1971. Mrs. Dwyer died shortly after commencement of the instant suit on May 16, 1969. The second action is brought against Louis Hall, Jr., the trustee of an inter vivos Massachusetts trust which purportedly consists of 5/6's of the property plaintiff claims is his, and two sisters of Louis Hall, Jr., named remaindermen under the trust. According to plaintiff, this court should stay its hand, since he will be pursuing the Massachusetts claim more actively, the risk of a distribution being imminent under that trust.

This court is unwilling to use Rule 25(a), a rule which has as its end the expedition of litigation, to accomplish a contrary end, i.e., the slowing down of litigation. There is no reason to afford the Massachusetts action priority over the instant one. (See National Equipment Rental, Ltd. v. Fowler, 287 F.2d 43 (2d Cir. 1961); Bulldog Eleg. Prods. Co. v. Cole Elec. Prods. Co., 57 F.Supp. 336 (E.D.N.Y. 1944), in which the court's articulate the rule that the first court to obtain jurisdiction over parties and issues should usually have

priority over the second court)

The motion pursuant to Red. R. Civ. P. 25(a)

is granted.

Dated: New York, New York

August 19, 1971

CONSTANCE BAKER MOTLEY U. S. D. J. AFFIDAVIT OF RICHARD OWEN IN SUPPORT OF DEFENDANT'S SECOND MOTION
FOR SUMMARY JUDGMENT
702a

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff,

-against-

AFFIDAVIT

LOUIS H. HALL, Jr. as Preliminary Executor of the Estate of HELEN B. DWYER,

Defendant.

SS.:

STATE OF NEW YORK)

COUNTY OF NEW YORK)

Richard Owen, being duly sworn, deposes and says:

I am a partner in the firm of Owen & Turchin, attorneys for the Estate of Helen B. Dwyer, defendant herein.

Plaintiff's deposition was taken at Frankfurt -am-Main in Germany on February 9, 1970. A duly certified copy of his deposition was filed with this Court on defendant's prior motion before Hom. Constance Baker Mo 'ey, U.S.D.J. Several documents were marked as exhibits during plaintiff's deposition. Copies of certain of them, Exhibits A, B, C, D, E and G are annexed hereto in support of defendant's motion.

In addition, copies of the order under which the

Attorney General vested the property of Helen B. Dwyer, now claimed by plaintiff, Vesting Order No. 12528 dated December 15, 1948, the August 1951 stipulation settling Decedent's 1949 action against the Attorney General in the District Court, District of Columbia, and returning 55% of the vested property to Decedent, and the

decision by the Department of Justice, Office of Alien Property, dated June 5, 1962, denying plaintiff's Claim No. 63692 for a return of his other fund vested by the Attorney General under Order No. 7298, are annexed hereto as Exhibits 1, 2 and 3 respectively.

It is submitted that as set forth in the Memorandum of
Law submitted herewith and the annexed exhibits, there is no
genuine issue of fact and that as a matter of law plaintiff has no
claim against the Estate of Helen B. Dwyer and therefore the
complaint herein should be dismissed.

Richard Owen

Sworn to before me this 19th day of October, 1971.

MERTON J. TURONTH

Notary Public. State of New York

Commiss

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EXHIBIT A - LETTER TO HELEN B. DWYER DATED MARCH 15, 1938

EXHIBIT B - LETTER TO STONELEIGH CORP. DATED MARCH 15, 1938

EXHIBIT C - LETTER TO PUTNEY, TWOMBLY & HALL DATES MARCH 15, 1938

EXHIBIT D - AGREEMENT SIGNED BY PLAINTIFF

EXHIBIT E - STONELEIGH CORP. STOCK CERTIFICATE

EXHIBIT G - ATTESTATION BY PLAINTIFF ON JUNE 1, 1948 WITH TRANSLATION

(Omitted here but printed at pages 645a through 651a)

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT 1 - VESTING ORDER

Re: Stock mined by and debts owing to Kurt Jehndeder, 1114 9

Under the authority of the Trading with the Enemy act, as arenied, Executive Order 9193, as arenied, and Executive Order 9788, and pursuant to law, after the vestigation, it is hereby found:

- That Kurt Schmiedor, whose last known address is Leerane, Saxony, Gernary, is a resident of Gernary, and a national of a designate! enony country (Germany);
- 2. That the property described as follows:
 - That certain debt or other obligation of The kww York Trust Company, One Hundred Broadway, New York 15, New York, arising from the crudit balance in a blocked custodian account, account numbered 6832, entitled Helen B. Dwyer, naintained with the aforesaid Company, and any and all rights to denami, enforce and collect the aforesaid dobt or other obligation and any and all accruels thoroto,
 - b. Those certain shares of stock described in Exhibit &, attached hereto end by reference made a part hereof, registered in the name of Helen B. enyer, presently in the custody of The New York Trust Company, One Handred Breadway, New York 15, New York, in a blocked custodian account, account numbered 6832, and entitled Helen B. Dayor, togother with all declared and unpaid dividends
 - All rights and interest created in Helen B. Dayor in and to the followings
 - (1) That cortain Monorandum of Agrocaunt made and untered into as of the fifteenth day of October, 1941 by and between Louis H. Hall, Jr., and Helen B. Ager, executed on December 4, 1941, and that certain Homorandum Amending the aforesaid Henorandum of Agreement, executed by the aforesaid Louis H. Hall, Jr., and Holon B. Dwyer, on April 23, 1942, said Monorandum and Anending Lenorandum presently in the custody of The New York Trust Company, One Hunired Broadway, New York 15, New York, in a blocked custolian account, account numbered 6832 and entitled Helen B. Dwyer Holor B. Dwyor,
 - (2) ary cmi all securities held in a blocked custodian account numbered 6832 and entitled Helen B. Dryor, maintained at The New York Trust Company, One Hundred Breadway, New York 15, New York, said securi-ties held as collatoral under the terms of the said conorantun, and
 - (3) That cortain quit claim doed executed and delivered to Holon B. Dayor by Louis H. Hall, Jr., pursuant to the terms of the aforesaid monorania and the real proporty covered thereby, and
 - These cortain debts or other obligations ovidenced by four (4) notes executed by Elizaboth K. Hall, payable on donand to Holen B. Dwyor, dated, in the face amount and bearing interest at the rates set forth belows

Interest Rate 110,000,00 Date November 10, 1941 April 25, 1942 Argust 15, 1942 600.00 E00.00 4,500.00 Larch 16, 1942

said notes presently in the custody of The New York Trust Company, Control broadway, New York 15, New York, in a blocked of the account, account numbered 6032, and entitled block B. . . , and my rat all rights to demand, enforce and cold . the advected of the or other obligations, and and cold this arroyald follow or other oblighting, and are cold the cold the cold the relations with any cold all rights the cold the cold

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is not attached the United States owned are sent and become product and inversable to, held on behalf of are on a country of a relation of a which is evidence of ouncership or control of a designated or country (3 armany);

and it is hereby determined:

3. That to the extent that the person named in subparagraph 1 hereof is not within a designated energy country, the national interest of the United States requires that such person be treated as a national of a decignated and my country (Jermany).

All determinations and all action required by law, including appropriate consultation and certification, having but and and taken, and it being deemed necessary in the national interest,

THERE IS HEREBY VESTED in the Attorney 3 and of the United States the property described above, to be held, us a, a chartered, liquidated, sold or otherwise acalt with in the interest of making the benefit of the United States.

The terms "initional" and "design tode about country" as used herein shall have the meanings prescribed in section 10 or Resoutive Order 9193, as amended.

(40 Stat. 411, 50 U.S.C. App. 1; 55 Stat. 809, 10 U.S.C. App. 50p. 616; Pub. Law 322, 79th Cong., 60 Stat. 60; Pub. Law 371, 7atr Cong., 60 Stat. 925; E.O. 9193, July 6, 1942, 7 F.R. 5205, 3 CTR, Con. Supp.; E.O. 9567, June 8, 1945, 10 F.R. 6917, 3 CTR, 1945 Supp.: E.C. 9768, Cct. 4, 1946, 11 F.R. 11981)

Executed at Mashington, D.C., on December , 1945.

For the atterney General

(Signed) David L. Bazolon

David L. Razelon Assistant Attorney General Director, C: ich of Alien Property

(Official Seal)

34

I hereby certify that the within is a true and correct copy of the original paper on file in this ordice.

For the ittorney Gonotal David L. Burdon, Associate Attorney General Director, office of interpretation Property

Response The Glanton

Aprilant Secretary for Records

RE: Stock owned by and debts owing to Kurt Schmieder

EXHIBIT A

| Name & Address of Issuer | required | State of Incorporation | Certificate Number | ers | Number | of Shares | Far Value | Type of Ct ok |
|--|---------------|------------------------|-----------------------------|-------------|---------|-----------------|----------------|---------------|
| Allied Mills, Inc. 3400 Board of Trade Building | 6/15/45 | Indiana | NY 31108 | Fed Res | 3/15/49 | 100 27/4 | :20 | Connon |
| Chicago 4, Illinois **Jahallis - Chalmers Manufacturin **Eilwaukee, isconsin | g Company | Delaware | c 86644X | | | 100/3273/16 | E0 | (Same 2) |
| The American Agricultural Che | mical Company | Delaware | Y 108c3 | ,, | " | 100 / 5 : 2 , 4 | 1.0 | · · 7 2 - 5 |
| American Can Company 2 4/230 Park Avenue 10 York 17, New York | | New Jersey | 233914
233915
0408136 | | " | 100-3 8/34 | 25
27
25 | Conner Conner |
| American Gas & Electric Compa | ar.y | New-York | AC 32303 | . " | ., | 100 | 10 | 9 |
| American Telephone & Telegrap
195 broadway
New York 7, New York | ph Company | New York | ii 135450√ | | 11 | 3', .,,, . | 2041 | Cup lite. CKS |
| The American Tobacco Company
111 Fifth Avenue | | 9/9/45 C 24869 | 1 | | | 170 | £; | , j., |
| American Viscose Corporation
Delaware Trust Building 5/
Wilmington, Felaware | 4/12 | Lelaware | WY/C 5275 | , " | | 100 - 1 | .4 | €.ar : |
| Atlantic City Electric Compa
1600 Pacific Avenue
Atlantic City, New Jersey | min 1, E | New Jersey | CO57 | 125 = 196 = | 2. | . 2. | 16 | 7074 |

Res of oursed by and debts owing to kurt Schmieder

| | State of | Certificate Numbers | Number of Shares | Per Velue | Type of Stock |
|--|----------------------|-------------------------|-----------------------|------------|--|
| Lan & Address of Issuer The Borden Company | New Jersey | C 31379 - Tedies | 100 - 20 40 | 15 Tad. Go | Capite |
| 3 0 Whiten Avenue A fork 17, New York | New Jursey | A 803./55 | 100 shares end. + /s | 4 5 | Chass A Common
Class a Common
1.25 m.m. Cum. |
| s Jursey | TNC6743-75012 | . 5203/4 | 10. com s .d. + &
 | NO NO | preferred
Common |
| Consolidated Dison Company of New York, and
4 irving Place,
New York, New York | | | 100 . 227 | 5 | Cormon |
| Chesapeake Corp. of Virginia | Virginia
Virginia | 201241 | 100 - 12/ | 25 | Cormon 70 |
| Sechmond, Virginia | Telaw.re | D 7933 Å .′ | 100 1 1 1 | 250 | Common 9 |
| tout, schigas | New York | 35309^ '' | " 100 - 23 78 | xc | Commer |
| rny, he w fork | [.]aware | 0 24576 %
0 185084 % | 12 , 34, 58 | 15
15 | Capital
Capital |
| on real Electric Company | Now York | ∺YC 827572 ⊀ '' | 100 '@ 391/8 | 110 | Counts |
| 1 miver Read
Seminortady, New York | | | | | |

| pr. Stock own d by and detts owing | to | Kurt | Schmieder |
|------------------------------------|----|------|-----------|
|------------------------------------|----|------|-----------|

| RE: Stock own d by and detts owing to kurt s | Schmiede. | | | | Par Velue | Type of Stock |
|---|------------------------|---|--------|-----------------|-----------------------|-------------------------------|
| | State of Incorporation | Cortificate Numbers | | of Stares | | |
| General Motors Corporation | Delaware | | 126/49 | 100' @ 58/2 | 10 | Common |
| 1 3044 Last Grand Blvd.
Latroit, Michigan | Ohio | NC 49171 , | , | 100 - 4.42 | HC
NO | Corner. |
| Ocodyour Tire & Rubter Compuny 1144 East Market Struct 2/4/4 2 Aron 10, Onio | | nc 49172 | " | 100/e-1 | 10 | Capital |
| International Salt Company toronton 2, Pennsylvenia 7:3/47 | New York | e 407050 | " | 100 - 6 56 /2 | 1.0 | Capital |
| Konnocott Copper Corporation 120 Broadway Low York 5, New York Phillips Petroleum Company | Delawaro | 313111*
313112* | | 100% 58 1/2 | 20
20 | Capital
Capital |
| iew York, New York | New York | N 198676 | 1 | 100- @ 3834 | no | Capital |
| Suars, Ruebuck and Co. 8/15/4/ 925 South Homen avenue 8/15/4/ Chicago, Illinois Stradurd Oil Company Cac 1934 - 1 7/10/19 30 Acceptable 7/12: 6/1/40 | 1, | C767835 B 607902
C7 67835 CC 1704283 | Her | 100 ' C 7 5 / 6 | 25-
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| Straterd Oil Company 30 m. oxefeller Flere 6/1/40 - 1 10 m. York, New York 19/15/40 - 1 The Toxes Company 11 D.st "2rd Struct 1 Work, New York | felaware something | Alik 12 -0365607- | 200-60 | 100 - 6.86/ | ± 100 | Commer. |
| Union Facific Fairend Company lish and hedge Structs Cruha 2, hetraska | New York | WI/O 263716 X | , t | 100 /044 | 14 10 | C ::: |
| icolworth Foolding Now York, 7, New York | | | | | | 709. |

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EXHIBIT 3 - ORDER DISMISSING TITLE CLAIM

CITTLE STY ... OF

DEPARTMENT OF JUSTICE OFFICE OF ALICH PROPERTY

WASHINGTON, D. C.

In the Matter of:

KURT SCHOOLEDER

Vesting Order No. 7298

Claim No. 63692

ORDER DISHISSING TITLE CLAIM (Ineligibility of Claimant - Objection)

Pursuant to Section 502.25(1) of the Rules of Procedure for Claims of this Office (8 CFR 502.25(1)), the Chief of the Claims Section on July 10, 1957 notified the claiment by registered sirmail, return receipt requested, that after the expiration of 40 days he would apply to the Director for an order discussing the claim on the ground that the claimant was not eligible for a return of property under Section 32 of the Trading with the Energy Act, as amended (50 U.S.C. App. 32), and that, in his opinion, no favorable action with respect to the claim is possible under Section 32 of the Act. The claimant was further advised that within the 45-day period a statement specifying objections to the proposed dismissal might be filed, together with ressons in support thereof and that any evidence or other material in support of the claim which has not been previously filed with this Office should be filed with the statement of objections. The claimant has timely filed a statement of objections.

Upon the application of the Chief of the Claims Unit and after considering the objections filed by the claimant and finding that no genuine issue is reised thereby and that the claimant is not eligible to receive a return of vested property under Section 32 of the Act;

IT Is ORDERED that this claim be and it is hereby dismissed.

Dated of Machington, D. C.

MM 5 1642

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> MEMORANDUM OF LAW ON BEHALF OF LOUIS H. HALL, JR. AS PRELIMI-NARY EXECUTOR IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendent, the Preliminary Executor of the Estate of Helen B. Dwyer, moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that the uncontrovertible facts herein demonstrate that the Estate of Helen B. Dwyer is entitled to summary judgment as a matter of law.

Plaintiff, a citizen of the Federal Republic of West Germany, commenced this action on May 16, 1969 alleging that Decedent had a "moral obligation" to give to him certain stocks and bonds which he, while a citizen and resident of Nazi Germany in 1938, gave to her in the United States of America as a gift. In paragraph 6 of his complaint plaintiff concedes he intended the gift to be "impregnable at law".

As will hereinafter be demonstrated the vesting of this very property by the Attorney General under the Trading with the Enemy Act in 1948 and the subsequent settlement of Decedent's suit to recover the property cut off any claim, legal or equitable, that plaintiff may have had to the property and destroyed any basis whatsoever for the plaintiff's instant action.

POINT I

THE FACTS

Plaintiff a German citizen and resident in the early 1930's had stocks and bonds in the United States held in his name in an account at the New York Trust Company

in New York City (3).* In 1934, plaintiff, concerned about the Nazi laws requiring reporting of assets outside Germany, transferred a portion of these assets in the name of his sister-in-law, Mrs. Jennie Bochmann** who was then living in Switzerland (3). Plaintiff continued to receive the dividend income on the securities (3-4). In 1935, plaintiff's friend, William Graupner, *** who was a resident and citizen of the United States, had the Putney, Twombly & Hall law firm in New York, create Stoneleigh Corporation under the laws of the State of Delaware. The securities in the name of Jennie Bochmann, then worth approximately \$150,000, were transferred to Stoneleigh Corporation in 1936 (43,61). All of the 500 issued shares of Stoneleigh were issued to the name of Jennie Bochmann (6-6A). According to plaintiff, he discussed his increasing concern about the Nazis tracing these unreported securities to him with his friend William Graupner (44). At the same time, Jennie Bochmann feared that her ownership might cause her trouble with the Swiss authorities (8,43-4), and there was the

^{*} References are to pages in plaintiff's examination before trial on file with this Court.

^{**} Mrs. Bochmann is dead (5).

^{***} Mr. Graupner died in 1954 (17).

Plaintiff finally decided that the only way to avoid any risk to himself was to eliminate all ties of ownership to this property. After consideration of possible donees, none of whom were used, finally, according to plaintiff, he met with Hall, Sr., father of the Preliminary Executor herein and member of Putney, Twombly and Hall, in Leipzig, Germany in 1938 and Hall Sr. told him that Helen B. Dwyer* his legal secretary, had agreed to accept an absolute and unconditional gift of all the property in Stoneleigh Corporation (10).

Subsequently, in March of 1938, Jennie Bochmann, made an absolute gift of all 500 shares of Stoneleigh Corporation to Mrs. Dwyer (12,17, Defendant Ex.E).** This transfer was effected by three letters from Jennie Bochmann in Switzerland: to Mrs. Dwyer in New York (Defendant Ex.A), to Stoneleigh Corporation (Defendant Ex. B), and to Hall Sr.'s law firm, Putney, Twombly & Hall (Defendant's Ex. C). All three exhibits set forth Jennie Bochmann's desire that an

^{*} Mrs. Dwyer died in 1970.

^{**}Copies of the exhibits are annexed to the moving affidavit.

unconditional and absolute girt be made of all these shares to Mrs. Dwyer. Plaintiff also furnished a note to William Graupner to confirm that this transfer was made with his specific knowledge and approval (12-14, Defendant's Ex. D).

Subsequently in 1943, the Treasury Department blocked all of Mrs. Dwyer's accounts in New York as the "property of a national of a foreign country". Decedent, at all times having been a loyal citizen and resident of the United States, was granted several licenses to withdraw funds from her blocked bank accounts. In 1948, the Attorney General as successor to the Alien Property Custodian, under the Trading with the Enemy Act 50 U.S.C. App. §§1-40 (1946) as amended and Executive Orders 9095, as amended, issued Vesting Order 12528 (Ex.1). Pursuant to that order, securities, designated on a list attached thereto, owned by Mrs. Dwyer and maintained by her in a Custodian Account at New York Trust Co., were seized as property within the United States owned by or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to plaintiff a national of an enemy country, Germany. This vesting of the property claimed by plaintiff is alleged and admitted at paragraph 7 of the complaint.

In 1949, Mrs. Dwyer commenced an action in the United States District Court for the District of Columbia against the Attorney General for the return of this property (20-24) alleging that she was not holding it for plaintiff in a cloaking operation, but on the contrary, was the absolute owner thereof as a result of a gift from plaintiff. The commencement of Mrs. Dwyer's action is alleged in paragraph 8 of the complaint. Significantly, for specific use in that action plaintiff in Germany signed a statement under oath on June 1, 1948, stating that the gift to Mrs. Dwyer was "voluntary, absolute [and] irrevocable... without any obligation on Mrs. Dwyer" (Defendant's Ex.G). Parenthetically, that statement if true at the time bars his right to relief both as a matter of fact, sign it affirms the gift and, if false as he now asserts, his claim is also barred as a matter of law, since it is a confession of a criminal fraud under the Trading with the Enemy Act Title 50 U.S.C. App. §16 and also constitutes the crime of making a false affidavit, Title 18 U.S.C. \$1001.

In 1951, Mrs. Dwyer's action against the Attorney General was settled and she received from the United States government securities representing 55% of the value of the property seized by the Attorney General under

the vesting order (35-6). This settlement is alleged specifically at paragraph 10 of the complaint and a copy of the stipulation is annexed to the moving affidavit as Ex. 2.

Plaintiff, in addition to the property given to Mrs. Dwyer as a gift, had certain other assets in this country prior to World War II. The Alien Property Custodian seized this so-called "second" fund under Vesting Order 7298. In 1955, plaintil filed a claim, No. 63692, with the Department of Justice, Office of Alien Property, seeking a return of this second fund on the ground that, although a German national during the war, he was persecuted by the Nazis. In June 1962, plaintiff's claim as to this second fund was denied on the ground that he failed to raise any genune issue as to persecution by the Nazis and therefore was not eligible to receive its return under \$32 of the Trading with the Enemy Act. A copy of the decision denying his claim is Ex. 3 annexed to the moving affidavit.

It is submitted that these facts require the granting of summary judgment dismissing the complaint.

POINT II

NO CAUSE OF ACTION AGAINST MRS. DWYER'S ESTATE

Under the applicable statutes and case law plaintiff has no cause of action against the Estate of Helen B. Dwyer. The vesting by the Attorney General and the subsequent transfer of the property to Mrs. Dwyer cut off any claim plaintiff may have had against Decedent for the property constituting the 1938 gift. The underlying statute is Trading with the Enemy Act, 50 U.S.C. App. \$12, which states the Alien Property Custodian may "exercise any rights or power which may be or become appurtenant thereto or to the ownership thereof in like manner as if he were the absolute owner thereof." (Emphasis added). Thus, in accordance with this clear language, the Alien Property Custodian, and its successor, the Attorney General, obtained absolute title to any property vested and therefore any transfer by the Attorney General of property vested gave good title to the transferee.

The cases under this section are clear to the effect that the settlement by the Attorney General and the return of the vested property eliminated any claim to the property that plaintiff might have had as against Decedent.

In <u>Mutzenbecher</u> v. <u>Ballard</u>, 16 F.2d 173 (S.D.N.Y.) aff'd, 16 F.2d 174 (2nd Cir. 1925) plaintiff, a German co-partnership, was entitled to a portion of the commissions earned by defendant in this country. Plaintiff's interest was seized by the Alien Property Custodian under the Trading with the Enemy Act. In a suit by the German co-partnership for its portion of the commissions, the Court dismissed the complaint on the ground that the vesting by the Alien Property Custodian cut off all rights to the commissions that the German partnership had. Squarely applicable to the instant case, the Court stated at p. 174:

"Where the Alien Property Custodian has made a disposition of seized property of an enemy alien, including the adjustment of an alleged claim, such settlement cannot be attacked by the enemy alien, nor has the enemy alien any standing in a suit brought against the one with whom the Alien Property Custodian has settled."

In <u>Munich Reinsurance Company</u> v. <u>First Reinsurance</u>

<u>Company</u>, 6 F.2d 742 (2nd Cir. 1925) the Alien Property

Office, under the Trading with the Enemy Act, seized stock

in the defendant corporation which was owned by plaintiff,

a German corporation. Thereafter Alien Property transferred

that stock to certain United States citizens. Defendant

corporation asserted a claim of some \$50,000 against the

German corporation which the Alien Property Custodian paid out of the seized property. The instant suit was brought by the German corporation for a return of the money paid by the Alien Property Custodian from the plaintiff's seized assets. The Court stated at p.747:

"This complainant, at the time the Custodian seized and sold its shares of stock in the defendant company, was in our opinion, divested of all right, title or interest in the property, and in the proceeds realized by the subsequent sale of the property. It could not thereafter reclaim the property from the person to whom it was sold. It had no right to or interest in the proceeds of the sale, and no right to reclaim any portion thereof which the Custodian paid over to a third person in settlement of a claim which such person had against the enemy."

And at p.751:

"From the time the stock was seized and taken into the Custodian's possession, the title to the stock passed to the Custodian, as trustee for the United States, an owner, to be dealt with as the United States, as owner, might determine. The complainant could not reclaim the stock from the purchaser. Neither could it reclaim the proceeds of the sale."

Similarly, in <u>Junkers v. Chemical Foundation, Inc.</u>, 287 Fed. 597 (S.D.N.Y. 1922) defendant was the transferee without consideration of a patent seized by the Alien

Property Custodian. The complaint by the former owner, an enemy national, who sought return of the patent, was dismissed, the court stating at p.600:

"After seizure, however, the original owner had no title, legal or equitable, which he could assert."

In <u>Balkin Nat'l Insurance Co.</u> v. <u>Commissioner</u>,

101 F.2d 75 (2nd Cir. 1939), the question was whether or not
the enemy alien had a duty to file an income tax return
and the Court held that it did not, stating at p. 77:

"Seizure of an alien's property under the Trading with the Enemy Act divested the alien owner of every right in respect of property or money so seized, and passed title thereto to the United States for such disposition as the Congress might thereafter see fit to make."

Also to the same effect see <u>Klein v. Palmer</u>, 18 F.2d 932 (2nd Cir. 1927).

Plaintiff, by his very complaint is squarely within these legal authorities. He alleges that the assets he seeks to recover in this action were "seized by the U.S. Government as enemy alien property", that Mrs. Dwyer brought an action for the return of this property and thereafter "received part of said property from the U.S. Government..."

Thus, from the very facts alleged in the complaint, as amplified by his own examination before trial, plaintiff does not have a cause of action against Mrs. Dwyer's estate. The securities he asserts a claim of ownership over were vested by the Attorney General. As he alleges in his complaint, a portion of these securities were transferred to Mrs. Dwyer by way of settlement. This transfer of title to these securities by the Attorney General eliminated any claim, legal or equitable, plaintiff may have had to the securities returned to Mrs. Dwyer.

Plaintiff's only remedy, if he asserts the vesting was not proper, is a claim against the Attorney General. However, plaintiff already asserted that his property should be returned in his Claim No. 63692 filed in 1955 with respect to the second fund of assets he had in this country which also had been seized by the Alien Property Custodian. This claim was denied in 1962: plaintiff was unable to offer any evidence to bring himself within the Nazi persecution requirement of 50 U.S.C. App. §32. Since he has no right against the United States, he has even less right against the Estate of Helen B.

Dwyer and any such claim would violate the clear legislative mendate of the Trading with the Enemy Act precluding

the return of vested property to German nationals.

CONCLUSION

It is therefore submitted that because plaintiff has, as a matter of law, no right to any portion of the property of the Estate of Helen B. Dwyer, summary judgment should be granted dismissing the complaint.

Respectfully submitted,

OWEN & TURCHIN

Attorneys for Defendant

Of Counsel
Richard Owen
Morton J. Turchin

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

-against-

LOUIS H. HALL JR. as Preliminary Executor of the Estate of HELEN B. DWYER,

Defendant.

: AFFIDAVIT IN OPPOSITION
: TO DEFENDANT'S SECOND
: MOTION FOR SUMMARY
JUDGMENT.

69 Civ. 1939

STATE and COUNTY OF NEW YORK: SS.:

WERNER GALLESKI, being duly sworn deposes and says:

I am the attorney for the plaintiff herein, who is a citizen of, and resides in the Federal Republic of Germany. By reason of numerous personal conferences with plaintiff I am thoroughly familiar with the facts and circumstance with respect to this cause. I make this affidavit in opposition to defendant's second motion for summary judgment.

- I. Motion should be dismissed because all issues raised by present motion were previously heard by the court and decided in plaintiff's favor.
- (a) Defendant-decedent, not having raised the defense of illegality, fraud, statute of limitations, laches, waiver or any other matter constituting an avoidance or affirmative defense, Federal Rules of Civil Procedure, Rule 8 (c), in 1969 brought a motion to dismiss this action under Rule 12 (b) (6) of the Federal Rules Civil Procedure for "failure to state a claim upon which relief can be granted." Frankel, U.S.D.J., upon an endorsement, and upon the failure of defendant to supply by way of an

affidavit or otherwise any proof of her assertions made in contradiction to plaintiff's complaint, held that the burden of demonstrating beyond doubt that plaintiff was not entitled to relief had not been sustained. At the very threshold of this litigation, this Honorable Court recognized that the "conscience of equity" embraces an infiniete variety of fiduciary relationships which create an open-ended situation consistent with plaintiff's invocation of the Court's inherent remedial powers. In point of fact, it was plaintiff, not defendant, who, sua sponte, addressed himself to the issue of presently alleged illegality(memo in opposition, pp. 11, sq.). The motion to dismiss was denied.

- (b) Seven mothhs ago, the present defendant for the first time raised and relied upon the defense of illegality by way of a memorandum in support of defendant's first motion for summary judgment (pp. 14, sq.). As in all of his prior motions, defendant stood transfixed upon the assertion that plaintiff's signed statement of June 1, 1948 (first motion for summary judgment, defendant's exhibit "G") bars his right to relief as a matter of fact and law. Again, this Honorable Court, by Motley, U. S. D. J. in a few short lines, after having addressed itself to June 1, 1948 statement, dismissed in full, and without qualification, the first motion for summary judgment.
- (c) Defendant, in his reply affidavit to plaintiff's affidavit in opposition to defendant's first motion for summary judgment categorically stated 'on the merits' that
 - "... we are a long way beyond the pleading state at which time this Court denied a motion to dismiss on the face of the complaint. As far as I know, we now have before the Court all of the testimony and documents before on this case that are available, and the Court is in as good a position as it would be, even on a trial, to determine the merits."

 (Emphasis supplied), p. 5.

Now, in defendant's present and second motion for summary judgment, and

without the injection of new facts, again alleges that the said June 1, 1948 statement represents an admission fatal to the maintenance of the within action by plaintiff; and that, if such statement be proved false, it is a confession by plaintiff of criminal fraud and other crimes. The gravamen of defendant's proposition is entirely identical with the issue of illegality placed before Judge Motley, who found "many disputed issues of fact" (opinion p. 7) without dignifying defendant's points of law by any discussion thereof.

- of the prior motions is the defendant's assertion that by virtue of the Government's vesting of plaintiff's property (complaint, para.7.), and the fact of settlement of the proceeding as between defendant-decedent and the Government and return of a portion of plaintiff's property (complaint, para. 10.) plaintiff's claim, right or interest was cut off. None of the prior Judges of this Honorable Court found any defect or disability, legal or equitable, in plaintiff's position by reason of said facts.
 - II. Motion should be dismissed on the further grounds that public policy and the "Conscience of equity" require it.

Inasmuch as this is the third motion in a piece-meal procedure conducted by defendant-decedent and the present defendant, whereby they seek, upon essentially identical arguments, to find a different Judge who might hold differently on the same set of facts, plaintiff shall not further swell the repetitive verbiage by defendant heretofore visited upon the Court. Therefore, plaintiff, for the purposes of its opposition to this motion, incorporates, refers to and otherwise includes herein the contents of the

record of all prior proceedings herein.

As to the factual background relating to the issues of public policy and illegality, an affidavit sworn to by plaintiff before a United States Consul at Zuerich, Switzerland on November 8, 1971, with English translation and my sworn certificate of its accurancy is attached hereto and made a part hereof. Said affidavit includes as a part thereof three exhibits, viz.; an East-German Criminal Court Order, dated September 23, 1948, directing plaintiff's arrest on the ground of violations of economic control regulations, a certificate of plaintiff's discharge from the Penal Prison of the Enforcement Facility at Zwickau, dated September 23, 1950, evidencing his imprisonment at Zwickau from December 14, 1948 to September 23, 1950; and a West-German decision of September 5, 1952, declaring the East-German conviction to be void and unenforcible under West German law. The affidavit shows that at the time of making the June 1, 1948 statement (defendant's second motion summary judgment, exhibit "G") the plaintiff was between two imprisonments and under investigation for the second one. This may picture the frame of mind in which he had to decide whether or not to put his signature under the statement. transmitted to him from New York through a clandestine messenger.

The affidavit also demonstrates that during World War II, plaintiff, in effect, was an ally rather than an enemy of the United States and that the administrative determination by the Office of Alien Property of his non-eligibility for return of vested property as relied on by defendant (defendant's second motion for summary judgment, exhibits, 1, 2 and 3) was due to the circumstance that his persecution as a member of a political group outlawed by the Nazi Regime had not been disclosed to the Office of Alien Property

because plaintiff was unaware of the differentiation applied in regard to individual resistance and group resistance to the Nazi Regime, only the latter type being recognized as sufficient under Trading with the Enemy Act Section 32 A.

In fact, however, plaintiff was a member of an organization prohibited by Nazi law and resigned therefrom after it was forcibly taken over by the Nazi Storm Troopers. This set of facts, if submitted at the time, would have caused a favorable determination of the issue of plaintiff's eligibility. The aforementioned order pronouncing plaintiff's inelegibility, in my opinion was subject to judicial review. If such proper legal advice as plaintiff was entitled to expect from his attorney Louis H. Hall, Sr. had been imparted to him and if a fraction of the effort exercised to plaintiff's disadvantage had been devoted to a careful factual and legal investigation of his case, a 100% recovery of the property in issue could have been made to the fullest satisfaction of all parties concerned without any problems involving public policy and illegality. For the manifold and infinite aspects to be viewed for the requisite test of the "Conscience of equity" affecting defendants position, the foregoing aspect is decisive to destroy whatever doubt could otherwise remain as to the full fledged emergence of unjust enrichment on the part of the defendant and the imposition of a constructive trust ex maleficio in plaintiff's favor. There is nothing to impugn plaintiff's good faith since he had been advised by his attorney, the late Louis H. Hall, Sr., precisely to the effect expressed in said statement. Since defendant has not offered the slightest evidence inconsisten with, or disproving, the facts sworn to by plaintiff, we are confronted not only with a genuine factual issue but even with a predominant proof of plaintiff's position herein.

III. The present motion for summary judgment and underlying affidavit in support thereof are presented in bad faith.

Rule 8 (f) of the Federal Rule of Civil Procedure removes the former "sporting "element" from the pleading of civil actions, viz., (all) pleadings shall be so construed as to do substantial justice."

A fair construction of the pleadings herein consequently has the result that all matters referred to in the present second motion for summary judgment have to a sufficient extent been before the Court since issue was joined. The present submission of the settlement stipulatio, in decedent-defendant's action against the Attorney General (exhibit 2) does not even add factual accuracy because there is no showing how far it was actually implemented and since the pleadings and other relevant procedures in that action also are absent / the present record.

Under Rule 8 (c), illegality is one of the stated affirmative defenses which must be set forth in a response to a previous pleading.

Under Rule 12 (h) a party waives all defenses and objections not made by a motion under Rule 12 (summary judgment is not one of them), or by answer. In fact, defendant did file a motion based on failure to state a claim, which was denied. That decision becomes the law of the case, if not res judicata. American Surety Co. v. Baldwin, 287 U.S. 156,166-167.

Defendant argued in the previous motion that plaintiff could not, having once stated that the transfer was a completed gift, be heard to challenge it, and the Court ruled against her. To permit her now to cite new arguments in support of a new motion again asserting that defendant cannot be made to adhere to an undertaking constituting the basis for this action is to

reraise the factual issue held by the Cour previously to entitle plaintiff
to a trial. Such a piece-meal procedure, whereby a party attempts three
times to bring up new arguments to support her position, hoping that a different
judge might hold differently, is disfavored and not to be countenanced.

The Court has twice ruled that plaintiff has a cause of action on which he
is entitled to present the merits. Furthermore, defendant is barred from
bringing in a defense which under the Rules he has waived, and as to which
he cannot present evidence.

Defendant has brought three substantially identical motions and presented underlying affidavits with respect to the first and second motions for summary judgment which appear to have been presented in bad faith and which apparently are designed by defendant to annoy, harrass, embarrass and oppress plaintiff and economically deplete his financial resorces in defence thereof.

Such economic detriment to the plaintiff is further aggravated by the fact that, while he has greatest difficulty in paying for the disbursements involved in the procedural steps to be taken by him in four separate jurisdictions (here, Boston, Washington, and in the New York County Surrogate's Court) his opponents have the use of the money equitably coming to him for the financing of their costs. There is the desperate prospect that, the wasteful methods of litigating presently applied by the defendant will also be used in the future when it comes to appeals which may create indefinite delay. Plaintiff's age is 83.

WHEREFORE, plaintiff respectfully prays that

(1) Defendant's motion for summary judgment be dismissed as to

the whole, and without qualification; and

(2) Defendant pay plaintiff, pursuent to Rule 56 (g) of the Federal Rule of Civil Procedure, reasonable expenses and attorney's fees in the amount of \$ 2, 500.00.

WERNER GALLESK,

Sworn to before me this

18th day of November 1971.

SOPHIE ECKHARYT

MARCH 30, 1972

Bezirksgericht der Vereinigten Staaten : Sidlicher Bezirk von Lew York Fur D Schnieder, Klager, 69 Civ. 1939 - gegen -Louis H. Hall, Jr. als vorläufiger Testamentsvollstrecker : des Hachlasses Hele: B. Dwyer, Beklagter. Bezirksgericht der Vereinigten Staaten: Bezirk Hassachusetts Kurt Schmieder, Eläger, Zivilklage - gegen -71-872-J Winslow L. Webber und andere, Beklagte. Bezirksgericht der Vereinigten Staaten: für den Bezirk Columbia Frau Helen B. Dwyer, Klägerin, Zivilklage No.1182-'49 - gegen -J. Howard McGrath, Justizminister der : Vereinigten Staaten, Beklagter.

8

A FIDAVIT

Generalkonsulat der Vereinigten Staaten won Amerika Schweizerische Eidgenossenschaft Kanton und Stadt Zürich.

Ich, der unterzeichnete Kurt Schmieder, ansaessig in Lörrach, Bundesrepublik Deutschland, Frietstrasse 15, Kläger in den beiden ersten der obigen Rubra, erkläre nach ordnungsgemässiger Vereidigung wie folgt:

1. Ich bin wahrend der Zeit des Nationalsozialismus in Deutschland als Angehöriger einer aus politischen Gründen verbotenen Organisation verfolgt worden und habe wielfach durch öffentliche Erklärungen mit Angriffen gegen das Regime mein Leben auf das Spiel gesetzt.

Ich var mitglied des Stahlhelms, einer patriotischen Formation, deren Mitglieder in soldatenaehnlicher Weise für die Bewahrung des deutschen Kampfgeistes und gleichzeitige Aufrechterhaltung liberaler Ideen eintraten.

Ein Hauptziel dieser Organisation var Sicherung von Freiheit und Eigentum der Bürger in der Abwehr von Kommunismus und Nationalsozialismus. Ich wurde Mitglied des Stahlhelms 1930, nachdem mehrere Freunde von mir beigetreten waren und ich ebenfalls für die genannten Ideen kämpfen wollte.

Alsbald nach der Kachtübernahme von Hitler wurde der Stahlhelm verboten und aufgelöst. Alle Kitglieder des Stahlhelm
wurden zwangsweise und automatisch zu Kitgliedern der SA
gemacht und mussten deren berüchtigte Braunhemden tragen.
Die damit verbundene, jede Freiheit unterdrückende Disziplin
war für Cherträglich. Ich erklärte daher vielfach meinen
Abscheu vor dem neuen System in aller Oeffentlichkeit und
stellte einen Antrag auf Entlassung aus der SA.

4

Viele meiner Freunde betrachteten diesen Schritt als selbstmörderisch. Trotzder wurde die Entlassung mir im Herbst 1934 bewilligt, nachdem der vorangegangene Nürnberger Parteitag gerade eine Reihe von zit zeiner Weltanschauung unverträglichen Grundsätzen proklamiert hatte. Es gelang mir die für mein weiteres Leben durch reinen Austritt aufkommende Gefahr dadurch zu mildern, dass ich meinen Entlassungsantrag nicht auf politische Opposition scheern mit der Anspruchnahme durch meine geschäftliche Reisetätigkeit begründete. Von da an hielt ich mich, nachden ich nun schon öfters als Nazigegner herausgestellt hatte, auf Rat von Freunden so inaktiv wie möglich. Der kleine Rest meines Geschäftes, der noch geblieben war. wurde von den læis 1942 zugenacht. An irgend welchen Aktionen zur Unterstützung der Nazipartei oder kriegrischer Unternehmungen nahm ich niemals teil. Insbesondere war ich nach dem Austritt aus der SA niezals Mitglied einer sonstigen Organisation. Die rechtliche Erheblichkeit meiner Zugehörigkeit zu einer verfolgten politischen Gruppe war mir unbekannt, bis iah anlässlich einer Unterhaltung in Basel. Schweiz mit meinen Anwälten Werner Galleski und Robert H. Reiter am 10. Februar 1970 auf meine Mitgliedschaft im Stahlhelm zu sprechen kam. Die Anwälte, welche meine Anträge auf Freigabe meines beschlagnahnten anerikanischen Vermögens bearbeiteten, hatten nur auf den von mir imividuell gegenüber dem Nazi-Regime geleisteten Widerstand wertgelegt.

2. Nach dem Zusammenbruch des Deutschen Reiches kam ich infolge meiner Ansässigkeit in Heerane-Sachsen unter das kommunistische Besatzungsregime, zu welchem ich wiederum von Beginn an in Opposition stand. Wiederum beschraenkte ich meine Erwerbstätigkeit auf ein mirimum und versuchte nicht aufzufallen.

- 3 -

. 1/

Vom 6.0ktober 1945 bis zum Februar 1946 wurde ich von der GPU (der russischen Geheimpolizei) wegen blosser Verdachtigungen wirtschaftlicher Art festgehalten. Dies war eine reine Polizeimassnahme. Keinerlei Dokumente oder Bestaetigungen wurden mir erteilt.

Im Oktober 1947 wurde ich wegen eines sogenannten Wirtschaftsvergehens von den deutschen Kommunisten mit einer gerichtlichen Geldstrafe belegt und blieb von da an unter strikter
Kontrolle. Anfang 1948 setzte eine Welle von sogenannten
Wirtschaftscabotageprozessen ein, und vom Hai 1948 an fand
auch eine entsprechende Untersuchung gegen mich statt.

Nachdelchie Vorwürfe gegen mich verdichteten, wurde ich etwa am 22.9.1948 abgeführt und ein offizieller Haftbefehl laut anliegender Kopie Solgte unter dem 23. September 1948. Bis zu meiner Ueberführung ins Gefängnis Zwickau am 14. Dezember 1948 blieb ich im Gefängnis von Glauchau.

Wie aus dem in Kopie beiliegenden Entlassungsschein ersichtlich, wurde ich aus Zwickau am 23.September 1950, insgesamt somit, nach mehr als 2 jähriger Haft entlassen.

Dass die mir zur Last gelegte Tätigkeit nach dem in Rechtsstaaten geltenden Rechtsempfinden weder kriminell noch sonst vorwerfbar war, ergibt sich aus der in Kopie beifolgenden Entscheidung des Generalstaatsanwaltes Karlsruhe vom 5. September 1962 mit welcher das Strafurteil des Landgerichtes Zwickau vom 18. Januar 1948 auf 2½ Jahre Gefängnis und Geldstrafe von 100.000.— DM für ungültig und unvollstreckbar erklärt wurde.

3. Als ich im Juni 1948 den Besuch von Dr. Alfred Lindner als Boten meines Freundes William Graupner empfing und von ihm gebeten wurde, die jetzt als eidesstattliche Erklärung

figurierende Urkunde (Beweisstück "G" zur Motion des Beklagten im oben erstgenannten Rubrum vom 19.0ktober 1971) zu unterzeichnen, vertraute ich auf die in den Jahren 1937 - 1938 von Rechtsanwalt Hall Sr. sowohl direkt wie durch William Graupner erhaltenen Ratschläge und war davon überzeugt, dass die in der genannten Urkunde enthaltenen Rechtsfolgerungen zutreffend waren. Die Urkunde hatte nichts mit moralischen Erwartungen zu tun. Der Hauptpunkt von Rechtsanwalt Hall Sr.'s Rechtsansicht war gerade dahingegangen, dass Frau Dwyer ein uneingeschränktes Eigentumsrecht erhalten sollte, und dass unser auf moralischen Erwägungen beruhendes gentlemen's agreement diese Rechtslage nicht beeinträchtigte. Sowohl unter den Mazis wie unter den Kommunisten wäre es für mich zu gefährlich gewesen, einen sonstigen Berater zwecks Nachprüfung der Rechtslage zu konsultieren. Ausserdem war mein Vertrauen in Hall Sr. und William Graupner grenzenlos.

D

Kurt Schmieder

CARTOR AGO CITY OF JUNIOR CONSULATE OCHERAL OF THE -----

Howard R. Gross of the United States of America th and for the District of Zurich, duly er meisseaned and qualified, this

eighth day of Novembers 71

Howard R. Gross

in der ist gur Untersuchungshaft zu bringen, die Spigt demond verlechtige men. bien of the h. our species aroung abgogation and h.ben und drait zongate intage inter start of the derivative of the start of the star

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bei a r liche der en er Die Untersuchungsiaft wird verhäuer weil tetarellie, tegründer ist.-

tiegen diesen Haftbefehl ist das Rochtsmittel der Beschwerde zulässig -

Gracken, den 23. Septe 8

- Das Landgericht . Strafkammer.

- Das Amtsgericht -

H . The chi (4) 112 He S(PO) - LG and AG Di Q5 Jan Stellung berfen Burben, Dreiden A

....

Entlassungsschein.

th. Nr. 2114/15

Beruf

as Strafgefängnis Vollzucsanstalt Zwickau Tel 5005 Hausanschluß: . den 23. September 1.50

. ...

per Furt Judnig Emil Schmieder

iliu thann geboren am .. 10. 1000

zu l'euranc

befand sich in der Zeit vom 14. dezozier 1960 bis 23. dentember 1960 im hiesigen Getängnis in Haft.

Er - FX findet mach seiner - MnXr Angabe:
 a) Unterkuntt in Meerkane, Schwanefelderstr. 6

b) Arbeit in

19 an das Amt für Arbeit und Sozialfursorge, Abt Mitteilung ist am ergangen. Soziallur-orge, in 2. Le - XX hat bei der Entlassung in bar ausgezahlt erhalten:

253,45 1111 111

1111

Zus. 211 15

M. Enthesings hein.

| -3. | Dem Amt für Arbeit und Sozialfürsorge in |
|-----|--|
| | sind am für jhn — sie überwiesen: |
| | a) Arbeit-belohnung *) DM |
| | b) Eigenes Geld |
| | Zux |
| 4. | Fahrkarte ist ausgehändigt nach |
| 5. | Vorhandene Kleidunz: |
| | an Oberkleidung: In Crinung |
| | an Unterkleidung: |
| | an Schuhwerk: |
| 4. | Bei der Entlassung sind ans Fürsorgemitteln an Bekleidung, Handwerkszeug usw. ausgehändigt |
| | worlen: |
| | |

*) Betrage als der Arbeitsbelohnung dürfen richt auf Unterstützungen angerechnet werden (Absehn, II Abs. 3 der VO. über Strafentlassenen- und Straffalligenfürsorge vom 9, 12, 47 — Zentr. VO. Bl. 48 8, 79).

H-Cultimater of ter

KARLSRUHE, den 5. Sept.1962 Hollstraße 10. Fernaprecher 20141 Staatszentrale

- RAH 24/62 -

Herrn Kurt S c h m i e d e r

785 Lörrach Postfach 276

Betr.: Antrag des Kurt S c h m i e d e r gem. § 15 hHG.

> Der am 8.10.1885 in Leerane/Mrs. Flouchou Geborene, in Iörrach, Hauptstrasse 15 wohnhafte

Kurt Ludwig Emil William Sich mie die r wurde durch Urteil der Strafkammer des Landgerichts Zwichau vom 18.1.1949 - 1 KLs 28/48 - wegen Wirtschaftsverbrechens nach Kontrollratsgesetz Er.50 Artikal I in Tateinheit mit § 1 des Schieber- und Schwarzhändlergesetzes vom 8.5.1947 und dem Gesetz zur Sicherung des Wirtschaftsplanes vom 29.1.1947 zu einer Gefängnicstrafe vom 2 Jahren und 6 Honaten scwie zu einer Geldstrafe vom 100.000 DH verurteilt, an deren Stelle im Falle der Uneintringlichkeit für je 50,- DH 1 Tag Gefängnis traten. Auf die Dauer vom 15 Jahren wurde ihm gemäss § 2 Ats. b des Gesetzes zur Sicherung des Wirtschaftsplanes die weitere Betriebsführung untersagt. Die in dem Strafvorfahren beschlagnahmten Gegenstänse murden eingezogen.

Auf antrag des betroffenen wird die Strofvollstrechung aus diesen Urteil genöss § 15 des Desettes über die innerdeutsche Rechts- und extshille in Strafsachen von 2.5.1953 für unzulässig größert.

W 0 1 1

Bedlautigt

Justizotersekretür

Carried Carrie

735

| Translation from the German language | | |
|---|-----|-----------------------------|
| | == | |
| UN D STATES DISTRICT COURT | : | |
| SOUTHERN DISTRICT OF NEW YORK | : | |
| | -: | |
| KURT SCHWIEDER, | : | |
| Plaintiff, | | |
| - against - | : | 69 Civ. 1939 |
| LOUIS H. HALL, JR., as Preliminary | : | |
| Executor of the Estate of HELEN B. DWYER. | : | |
| Defendant. | : | |
| | : | |
| | | |
| | ==: | |
| UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS | : | |
| DIDINIOI OI MADDAONODEIID | : | |
| | - | |
| KURT SCHMIEDER, | : | CIVIL ACTION |
| Plaintiff, | : | No.71-872-J |
| WINSLOW L. WEBBER, et als, | : | |
| Defendants. | : | |
| | : | |
| UNITED STATES DISTRICT COURT | == | |
| FOR THE DISTRICT OF COLUMBIA | : | |
| MRS. HELEN B. DWYER. | | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action
No.1182-'49 |
| J. HOWARD McGRATH, Attorney General of the United States, | : | 10.1102- 49 |
| Defendant. | : | |
| | | |

Consulate General of the United States of America Confederation of Switzerland Canton and City of Zurich

SS.:

I, the undersigned Kurt Schmieder, residing at 15 Hangstrasse, Loerrach, Federal Republic of Germany, being the plaintiff in the first two captions hereinabove, and having been duly sworn, depose and say as follows:

(1) During the period of the National Socialism in Germany I was persecuted as a member of an organization outlawed on political grounds, and I frequently risked my life by making public statements attacking the Nazi Regime. I was a member of the Stahlhelm, a patriotic formation hose members in a quasi-military manner worked for the conservation of the German fighting spirit and at the same time for the maintenance of liberal ideas. One of the main targets of that organization was the protection of liberty and property for the citizens in a defense against Communism and National Socialism. I became a member of the Stahlhelm in 1930 after a number of friends of mine had joined it and I also had the desire to fight for the aforementioned ideas.

Soon after Hitler's rise to power, the Stahlhelm was outlawed and dissolved. Compulsorily and automatically, all members of the Stahlhelm were made members of the Nazi Storm Troopers and had to wear their infamous brown shirts. The discipline connected therewith, which suppressed any freedom, was intolerable to me. Many times, I therefore stated my abhorrance toward the new system with all publicity and filed an application for a discharge from the Storm Troopers. Many of my friends described that step as suicidal. Nevertheless, the discharge was granted to me in the fall of 1934 after the just preceding Nuremberg Party Congress had proclaimed a number of principles inconsistent with my philosophy of life.

I succeeded in mitigating the dangers arising from my resignation from the Storm Troopers by the fact that I did not base my application for discharge on political opposition but used the subterfuge that the exigencies of my commercial travelling were too great. From then on, after having repeatedly exposed myself as an opponent to Nazism, I followed the advice of friends and remained as inactive as possible. The small balance of my business which was still left, was closed by the Nazis in 1942. I never participated in any action for the support of the Nazi Party or of the war effort. In particular, after leaving the Storm Troopers, I did not join any other organization.

The legal relevance of my membership in a group subject to political parsecution was unknown to me until in a conversation at Basel, Switzerland with my attorneys Werner Galleski and Robert H.Reiter on February 10, 1970 I came to speak of my membership in the Stahlhelm. The other attorneys which had handled my applications for a release of my property seized in USA had been interested in my individual resistance to the Nazi Regime only.

(2) After the German Reich had collapsed, my residence at Meeranem Saxony, caused me to be subjected to the Communist Occupation Regime, to which I again was in opposition from the beginning. I again limited my occupational activities to a minimum and tried not to be conspicuous.

October 6, 1945 through February 1946 I was kept in custody by the GPU (the Russian Secret Police) by reason of mere suspictions in economic respects. This was a mere matter of police administration. No documents or confirmations were issued to me.

In October 1947 the German Communists judicially convicted me for a so-called economic violation with a fine and from that time on I remained under strict supervision. In the beginning

of 1948 a wave of so-called economic sabotage proceedings started and from May 1948 a respective investigation was running gainst me. After the accusations against me had crystalized I was arrested on or about September 22, 1948 and a formal court order for my arrest followed under date of September 23, 1948. Up to my transport to the jail of Zwickau on December 14, 1949, I stayed at the jail of Glauchau. As appears from the certificate of my discharge as per enclosed copy, I was dismissed from Zwickau on September 23, 1950 so that my emprisonment exceeded two years.

That the conduct of which I was accused was neither criminal nor otherwise detestable according to the legal sentiment prevailing in countries guarding civil liberties follows from the decision of the Chief Prosecuting Attorney in Karlsruhe, dated September 5, 1962, as per enclosed copy, by which the criminal conviction pronounced by the Circuit Court in Zwickau on January 18, 1949 for 2½ years of emprisonment and a fine of DM 100,000 was declared to be void and unenforcible.

Lindner as a messenger sent by my friend William Graupner and was requested by him to subscribe to the document now figuring as a statement in lieu of oath (Exhibit "G" to the motion dated October 19, 1971 filed by the defendant under the first caption hereinabove) I relied upon the advices given to me by attorney Hall Sr., and directly as well as through William Graupner, in the years 1937/38 and I was convinced that the legal conclusions set forth in the said document were correct. That document had nothing to do with moral expectations. The main point of attorney Hall Sr.'s legal opinion significantly was to the effect that Mrs.

Dwyer was to acquire an unlimited title and that Tegal status was not affected by our gentlemen's agreement which was based upon moral considerations. Under the Nazis as well as under the Communists it would have been too dangerous for me to consult with some other adviser for a review of that legal opinion. In addition, my confidence into Hall Senior and William Graupner was limitless.

(signed) Kurt Schmieder
Kurt Schmieder.

(venue and jurat follow in English language)

741a

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

-against-

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HELEN B. DWYER, Defendant.

AFFIDAVIT OF ACCURACY OF TRANS. LATION FROM GERMAN LANGUAGE.

STATE and COUNTY OF NEW YORK; SS. :

WERNER GALLESKI, being duly sworn deposes

and says:

-

I am an attorney at law duly admitted to practice before the courts of record in the State of New York and other American courts with offices at 70 Pine Street, New York, N.Y.

I also am a member of the bar of the Court of Appeals in the city of West-Berlin, Federal Republic of Germany.

I am cognizant of the English and German languages.

I hereby certify that, to the best of my knowledge and belief the enclosed translation of the affidavit of KURT SCHMIEDER, sworn to before HOWARD R. GROSS, Consul of the United States of America at Zurich, Switzerland, on November 8, 1971, and the three exhibits thereto is accurate and correct.

Werner Galleski

Sworn to before me this

18th day of November, 1971

Concern County

Opening the State of New York

Any Pille State of New York

Opening to Grant County

Opening in Grant County

742a

2 PLs 777/43 Co 201110

To be cited in all commu-

Durlicate Original

nications

ORDER FOR ARREST 4)

If an order for arrest is promulgated by pronouncement, then the accused 4) has to be notified that upon demand he is catitled to a copy of the Order of Arrest (Criminal Procedure Act Sec. 1140, par. 3, sentence 2 EtFO)

LUDVIG HARL VILLIAM PUNT SCHMIEDER, born October 8, 1838 at Mecreace residing at 6 februaref. Mer Lirasse, Mecrane

urrently IN TO DE TAKER BYTO IN PARCIPARING ON REMAIND. He is suspected to have delivered from 1945 up to now an aggregate of approximately 3,000 meters of textile products without procurement permit and thereby to have misapplied merchandisc subject to economic central or to have purposefully permitted their application contrary to law, -a felony under Sec. 1 of the Order for Economic Control and Art. 1 of the law No. 50 - .

The impriconment for investigation is ordered because in view of the punishment to be expected, and suspicion of his intention to flee is factually substantiated. From this Order for Arrest the remedy of an appeal is admissible.

Publicate Original issued on September 23, 1948

The Recording Officer of the Clerk's Office of

the County of Clauchau

Glauchau, September 23, 1943

ical of the County Court in Glaudina

> The County Court (a) Wunsch

TRANSLATION FROM THE GERMAN LANGUAGE

CERTIFICATE OF DISCHARGE

The Penal Prison of the Enforcement Facility Zwickau, September 23, 1980

No. 2444/48

Tel. 5005, ext. ...

494

September 25, 1950

KURT LUDWIG EMIL SCHMIEDER

Merchant by occupation

bern on October C. 1888 at Meeranu

has been imprisoned in this prison from December 14, 1948 to September 23, 1950.

- 1. According to his statement he will find
 - a. shelter at 6 Schwanofelderstrasse, Mesrane
 - b. work at

Notice has been sent out on to the Office for Work and Social Welfare, I'pt. of Social Welfare at

- 2. At the time of the dismissal he was paid in cash:
 - a. His own money

DM 233.45

b. Compensation for labor *)

DM 10.00

c. Support

together

3. To the Office for Work and Social Welfare at a remittance was made on for

- ile

a. Compensation for labor *) DM --

b. Own money

DM --

- 4. Transportation ticket to ... has been delivered.
- 5. Available clothing:

Page 2 of Translation from the German Language of CERTIFICATE OF DISCHARGE

| | Outer wear: | ino | rder | | | | |
|--|-----------------------|------------|---------------|-----------|--------|----------------|--|
| | Underwear: | •••• | | | | | |
| | Follweare | •••• | | | | | |
| 6. | At the time of the di | emissal, t | the following | clothing, | tools, | etc., were de- | |
| | livered out of welfar | e funde: | ••••• | | | | |
| Shama of the Palementary | | | By Order | | | | |
| Stamp of the Enforcement
Facility at Zwicken (Saxony) | | | eignature | | | | |
| | | | Referes | 811 | ratur. | | |

Payments by way of compensation for labor are not permitted to be set off against support payments (Div. II, par. 3 of the Order concerning welfare for dismissed penal prisoners and persons subject to criminal conviction dated December 9, 1947 - Central Publication Bulletin for Executive Orders, Vol. 48, page 79)

WEST GERMAN DECISION OF SEPTEMBER 5, 1952 ANNEXED TO FOREGOING EXHIBIT

TRANSLATION FROM THE GERMAN LANGUAGE

Office of the Public Prosecutor at the Court of Appeals The Chief Prosecutor

Karlsruhe, September 5, 1962 10 Hoffstrasse Tel. 201 41 Central Office of the State

- RAH 24/62 -

Mr. Kurt Schmieder P. O. Box 276 785 Loerrach

> Re: Application of Kurt Schmieder in accordance with Sec. 15 of the Law providing Internal German Legal Assistance

KURT LUDWIG EMIL WILLIAM S C H M I E D E R
born on October 8, 1888 at Meerane, County Glauchau, residing at 15
Hauptstrasse, Loerrach

was convicted by judgment of the Penal Chambers of the Circuit Court in Zwickau or January 18, 1949 - 1 KLs 28/48 - for crime against the Economy under Control Council Law No. 50, Article I, and by the same act violating Sec. 1 of the law against racketeers and black marketeers dated May 8, 1947, and the law to secure the plan of the economy dated January 29, 1947, to imprisonment for two years and six months as well as to a fine of DM 100.00, in lieu of which in case of incollectability one day of imprisonment will be substituted for each DM 50.00. For a period of 15 years he is, under Sec. 2, par. b of the Law to Secure the Plan of the Economy, prohibited from managing any business. The assets ceased in the course of the criminal proceeding were confiscated.

Upon application of the party concerned, the penal enforcement of the

Page 2 of Translation from the German Language of Letter of Office of Public Prosecutor of September 5, 1962 to Mr. Kurt Schmi eder

said judgment is hereby declared inadmissible in accordance with Sec. 15 concerning the Internal German Rendering of Legal and Professional

Assistance in Criminal Matters dated May 2, 1953.

Woll

Certified:

Seal of the Office of the Public Prosecutor at the Court of Appeals in Karlsruhe

Signature

Judicial Superior Secretary

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

- against -

69 Civ. 1939

LOUIS H. HALL, Jr. As Preliminary Executor of the Estate of HELEN B. DWYER,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S SECOND
MOTION FOR SUMMARY JUDGMENT

I. Facts.

In view of the fact that the present motion constitutes a mere repetition of matters argued and disposed of before, Plaintiff, as per II first paragraph of his present affidavit in opposition wishes to avoid a restatement of the facts previously stated by him. He rather proposes to limit himself to such matters as appear in some detail on the record of the present motion.

Defendant continues to run armsk against the iron principles of a constructive trust as prayed for by Plaintiff herei and refuses to

digest the decisions rendered in Plaintiff's favor on the two prior motions testing Plaintiff's case. The holdings in Plaintiff's favor can be summarily stated to the effect that Defendant has not met the burden of showing that none of the infinite types of situations where equity corrects unjust and uncontionable enrichment fail to apply.

Although previously disposed of, Defendant brings again the reproach of illegality and the claim that Plaintiff's 1948 statement about an absolute and irrevocable character of the transfer to Mrs. Dwyer eliminated all chances of equitable relief and also contends that Plaintiff's claim was "cut off" through the facts of the vesting of the property herein and the respective settlement in the Washington action against the Attorney General in combination with the partial return of the vested property to her, all of which was already stated in the complaint and was made the basis of the prior decisions herein.

Plaintiff, on his part submits in defense of the present motion and in particular as a matter supporting public policy and absence of any illegality that he was discriminated against in Nazi Germany because of his membership in a persecuted group and would have been found eligible for the return of vested property if the respective facts had been communicated to the Office of Alien Property. He also furnishes more detail explaining his situation at the time when he made the aforementioned 1948 statement. He just was between two emprison-

ments for economic control violations in East Germany and the investigation for the second imprisonment was already running against him.

II.LAW.

Point 1: The Trading with the Enemy Act is to be administered subject to common law.

A cardinal feature in evaluating the impact of the Trading with the Enemy Act is the predominant priority of the common law. Charles Warren, the Assistand Attorney General who has frequently been called "the Father" of the Act, elaborated on the relationship between the common law and the Act in his review of Huberich's Treatise on Trading with the Enemy in American Journal of International Law, Volume 12 (18) pp. 676 sq. He statedthat the Act

"was not designed to codify the whole law upon the subject, and it specifically provided that the common law should govern in all matters not within the scope of its enactment. It left, therefore, many important topics to be determined very largely by the common law or by state laws then in force topics like the effect of war upon contracts; interests on debts due to enemies; devises and bequests to enemies; suspension of statutes of limitations; termination of agency, etc. etc. "

3

Those principles were also subscribed to by Justice Eder, Supreme Court, New York County, Trial Term (1942) 177 Misc. 939, 32 NYS 2 d 450 in his reconsidered ruling re Kaufman vs. Eisenberg, citing Assistant Attorney General Warren's legislative report according to which it was his intent in drafting the bill:

"to make it as little restrictive of American commerce and as liberal toward the enemy private person as was compatible with the safety of the United States and with justice to American interests...."

Point 2: The principles of constructive trust override all provisions of the Act, so that no constructive trust can be "cut off" by the Act where a factual situation arousing the "Conscience of equity" prevails.

A decisive consequence of the priority of the common law is the independence of the equitable basis for a constructive trust from any vesting of property under the Act. Even assuming without conceding that Plaintiff's fraud action was vested and that such action was cut off by the partial return of the property, there would still be nothing which could prevent equity as of now to find that the retention of the property by the Defendant is unconscionable. Equity is only looking at the moral merits of the present situation and all matters like vesting, divesting and return are of historical interest but not a limitation upon the equity powers of the Court. Also where courts and government agencies are used in the perpetration of fraud, the remedial device of the constructive trust is equally available. In view of the authority cited in the earlier judicial holdings herein as well as in Plaintiff's previous briefs, it may suffice to refer to the general analysis by Scott on Trusts (1967) Vol. V Section 462 page 3412, following Judge Cardozo in Meinhard vs. Salmon (1928) 249 NY 458, 467:

"A constructive trust is the remedial device through which preference of self is made subordinate to loyalty to others".

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So as to cover cases like the present one where the ownership of the subsequent constructive trustee was good at the time of vesting and bad at the time of later retention of the property, Scott summarizes based upon authorities (Sec. 462 1 page 3417):

"A constructive trust may arise even though the acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it."

To show the involvement of Mrs. Dwyer in the constructive trust regardless of the extent to which she participated in the 'gentlemen's agreement' between Plaintiff, Hall Sr. and William Graupner, Plaintiff relies on the following summary by Scott (Section 469 page 3442)

"Where the owner of property is enduced by the fraud of one person to make a gratuitous transfer of the property to another, it is clear that the transferee can not retain the property even though he had no notice of the fraud. A person is not permitted to benefit by the fraud of another, even though he was not himself guilty of fraud."

The probably oldest and most classical authority on that point is

Bridgeman vs. Green, 2 Ves. Sr. 627, Wilm. 58,65 (1755) through

Wilmot, C.J.:

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"Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it."

Even if Mrs. Dwyer as the legal secretary to attorney Hall Sr. were not professionally involved in the so-called gift transaction, she would still be subject to the imposition of a constructive trust without impairment by any provisions of the Act.

Point 3: Even technically, a'cut off' is provided for by the Act only in regard to matters of property administration by the Alien Property Custodian as common law trustee.

The cases cited by Defendant in support of a "cut off" are by no means "squarely applicable to the instant case", as Defendant argues. None of them involves anything like the present case, where property is vested and returned to the same person from whom it was taken, and then an equitable duty is claimed on the part of that person based on her own undertaking.

The first case, Mutzenbecher vs. Ballard 16 F. 2d 173 (S.D.N. Y.) aff'd, 16F. 2d 174 (2nd Cir. 1925) involves a claim against a third party for commissions which were vested by the APC. There was no claim of equitable obligation. The simple fact was that the APC took the property, and the former owner to ed to set aside a settlement made by the APC with the creditor. The Court simply held that legally the

claim was taken, so that the former owner was in no position to attack the action of the APC while it was in possession of the claim.

In the second case, Munich Reinsurance Co. vs. First Reinsurance Co., 6F. 2d 742 (2d Cir. 1925) the APC vested property, and paid out claims from the proceeds. These payments were challenged by the former owner. The court examined the Act and held that the APC had all the rights of a common law trustee to manage and administer the property vested.

In the case of <u>Junkers vs. Chemical Foundation</u>, Inc., 287 Fed. 597 (S. D. N. Y. 1922), the APC vested a patent which was transferred to the Navy Department. The former owner sued for patent infringement.

In <u>Balkin National Insurance Co.</u> vs. <u>Commissioner</u> 191F. 2d 75 (2nd Cir. 1939) the only question was the liability of a former owner of vested property, for tax on the income on the property which was vested by the APC. Therefore, none of these cases raises the question involved in the present suit: Can a person who receives property admittedly not based on consideration being paid, and being a stranger to the person owning the property so that no donative intent can be shown, keep the property, in the face of any understanding that it was to be returned to the true owner, whose interests were to be protected?

What Defendant is attempting to do is to use the vesting as a shield

behind which to hide the weakness of her own position. She cannot claim title free from Plaintiff's equitable claim in her own right, so that she must claim that by reason of the vesting she acquired a better right than she had prior to the vesting. This was not the purpose of the Act. As said by this Court in Chemacid S. A. vs. Ferroton Corp., 51 F. Supp. 756 (1943):

In all cases of this type, one of the most important aspects to be considered by the court is whether it will aid and comfort the enemy if the plaintiff is allowed to maintain the action, and, if successful, receive a judgment. 'There is nothing "mysteriously noxious"... in a judgment for an enemy alien. Objection to it is.... only so far as it would give aid and comfort to the other side."

Holmes, J. in <u>Birge-Fibre Co.</u> vs. <u>Heye</u>, 251 U.S. 317, 223, 40 S. Ct. 160, 161, 64 L. Ed. 281:

"The object is not to defeat the alien enemy of his right to recover what may be owing him, nor to shield the citizen from the enforcement of his just obligations, but to prevent any advantage being derived by the enemy, directly or indirectly, pending hostilities...."

It is now twenty six years since the end of World War II, and can hardly be argued that the present suit would aid the enemy in that war or any other. The Act was not intended to be a confiscation measure, but one of sequestration. As held by the Supreme Court in Zittman vs. McGrath, 341 U.S. 471 (1951):

"While the statute under which the "funds are to be"held, administered and accounted for" authorizes the vesting of such foreign-

owned property in the Custodian, in its administration " in the interest of and for the benefit of the United States", it is not a confiscatory measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds "shall be equitably applied" for the payment of debts"....

... The transfer of possession of these funds does not seek to work any automatic defeat of rights of any class of creditors, but takes on the estate for administration."

Here there were no creditors' claims filed against the assets, and the property has been returned, so that the legislative purpose has been satisfied. This Court said, in Stoehr vs. Wallace, 269 Fed. 827, that nothing is settled by the seizure itself under the Act except the sequestration of the property in the hands of the APC. The Courts of this State have held similarly. In Drewey vs. Onassis, 39 N.Y.S. 2d 688, 179 Misc. 578, it was reiterated that the Act is designed to prohibit use of property constituting the sinews of war, but confiscation was not the objective.

Consequently, as soon as the property was returned to Mrs. Dwyer, the status quo ante was re-established and the temporary sequestration of the property was lifted. There is no record of any adjudication of ownership in regard to the returned property. The settlement stipulation rather contains a provision for a dismissal of the action. This could

only indicate the possibility of a judgment against Mrs. Dwyer.

Point 4:

In any event, the basic technical precondition is missing: plaintiff's fraud action was not vested.

Defendant's cut-off argument is formulated in a manner as if

Plaintiff's cause of action herein had been vested. Only in such event

would it be thinkable to invoke the (non-existing) rule that the person

described in the vesting order as pre-vesting owner is cut-off from

his pre-vesting right even after the property had been divested and

without judgment returned to a third party who successfully claims

ownership under Section 9 of the Act.

Actually, however, our Trading with the Enemy system is governed by the principle of res-vesting. There is no global or automatic seizure of all property of an enemy alien, some of whose property has been vested. The landmark case of Kahn v. Gervan, Learned Hand,

U.S.D.J., Southern District of New York, (1920) 263 F 909, 913

spells out that the vesting investigation and decision of the Alien

Property Custodian was conclusive. The Vesting Order herein

(Defendant's Motion exh. 1) signifies a definite list of debts,

securities and other rights, purportedly owned by Plaintiff as subjectmatter of the vesting. No in personam claim running from Flaintiff against Mrs. Dwyer, such as a tort claim, was purported to be vested. Therefore, even if any both of Defendant's an retreated

erroneous conclusions were correct, i.e., if accumulatively

- (a) equity would not overstep all vesting events, and
- (b) a pre-vesting owner, after divesting, would be barred from asserting the temporarily vested claim.

e /en then Plaintiff's present action would not be impeded because it was not vested.

personam claim must have been intentional. From the pre-trial procedure in Mrs. Dwyer's Washington action the Attorney General had a lot of information about the background so as to substantiate the inference of undue influence. Still, the Attorney General made most tempt to cut off Plaintiff's rights against the Defendant and limited himself to the vesting of the res held by Mrs. Dwyer. He thus left all causes of action between the parties to them.

Point 5:

As of the time of vesting Plaintiff had no legal or equitable title in the property so that Mrs. Dwyer's action under Section 9 of the Act was good.

Under the legal qualification of the constructive trust as a mere remedial devise to serve the enforcement of Plaintiff's cause of action based upon fraud and undue influence it follows that as a matter of substance of law Mrs. Dwyer held an absolute and legal and equitable title to the items purportedly vested as property of the Plaintiff.

Even viewed retrospectively in the light of all after-knowledge including the arising of a constructive trust in the present law suit,

Mrs. Dwyer's title still was entirely clear at the time of vesting.

The possibility of a future constructive trust rests upon each and any legal situation of any kind. And this does not reflect any risk to the due administration of law because all safe-gurards to preserve public policy and other legitimate interest are automatically built into the working of equity. Whether or not a remedial constructive trust might arise in the future will depend on all the equities in such shape and form as they shall then appear.

Point 6: The thief is not a straw.

The brilliant perfection with which Mrs. Dwyer and her co-conspirators succeeded in obtaining absolute ownership through the so-called gift transaction extracted from him under the umbrella of ostensible professional protection negates the idea that Mrs. Dwyer's holding

of the vested property could in any way be deemed to have occurred for Plaintiff's benefit within the meaning of Section 9 of the Act. The Defendant's position throughout this proceeding clearly indicates Mrs. Dwyers as well as the present Defendant's resolution to deny any moral obligation and to resist all potential and actual claims of Plaintiff.

In testing the benefit -clause of Section 9 of the Act the accent must be laid on the practical effect of the given situation and that, as of the time of vesting, was a complete deprivation of Plaintiff in regard to the vested property.

After the property had been so sincerely stolen that not only the full legal and equitable title adhered to the thief but that also all subjective intent of the holder was most resolute in perpetuating Plaintiff's deprivation it is respectfully submitted that Mrs. Dwyer was at the time of vesting holding the property for her own benefit exclusively under with the legal effect that she was entitled to a return / Section 9 of the Act.

Point 7: The administrative decision holding Plaintiff ineligible for return of vested property is not binding upon this Court.

The administrative order denying Plaintiff's eligibility for return of vested property (in that case different from the property presently in issue) under title 50 App. USCA Section 32 (a)(2) C had to follow

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automatically from the wording of the said statute inasmuch as it presupposes a persecution through discrimination of a group of which claimant was a member. The respective facts although actually applicable had not been submitted to the Office of Alien Property. Plaintiff was advised about their relevance on February 10, 1970 only. Plaintiff concededly has a problem in attacking the said administrative decision directly with respect to the claim determined. But even toward such direct attack not all avenues are closed. In the present circumstance, it is respectfully submitted that Plaintiff is entitled to a reopening and judical review under Section 10 of the Administrative Procedure Act 60 Stat. 243 (1946), 5 U.S.C. Par. 1009 (1952), because Section 32 of the Act constitutes legislation enacted subsequent to the Administrative Procedure Act and not specifically excluding judicial review. The language in Section 7 C of the Act is respectfully submitted to be insufficient to comply. Certain decisions inthat area are either dicta or can be distinguished by reason of the special feature of Plaintiff's case combined with the fact that final agency action cannot be obtained after the dissolution of the Office of Alien Property. In any event a collateral attack against the administrative determination in regard to other property is clearly open beyond doubt.

Point 8:

Mrs. Dwyer's settlement with the Attorney General can still be reopened for reformation so as to provide for a return of 100% of the vested property subject to constructive trust for Plaintiff.

Plaintiff has instructed Robert H. Reiter, Esq. of Washington D. C. to prepare papers for the reopening of, and his intervention in, Mrs.

Dwyer's Washington action against the Attorney General.

Basis for the reopening is Plaintiff's involvement in the subject matter and the collusive action of his former attorneys in fighting the Attorney General (who stands in the shoes of Plaintiff as purported pre-vesting owner), ultimately to Plaintiff's detriment.

Upon reopening reformation will be sought on the ground that Mrs.

Dwyer's action was 100% valid, subject to the constructive trust for Plaintiff.

Plaintiff, now also in every technical sense an <u>alien friend</u>, is entitled to sue under Section 9 of the Act, the respective time limit under Section 33 of the Act is preserved by Mrs. Dwyer's Section 9 law suit. The merits of Plaintiff's claim will be supported by serious constitutional aspects, relating to an enticement into the US jurisdiction and a taking of his property without due process of law. It is notorious that Swiss banks are affording their clientele with opportunities for an anonymous investment of their funds. Plaintiff would clearly have

used such facilities unless the fraudulent prospect of safe preservation through the so-called gift transaction herein had constructed the image of a Fata Morgana to him.

Point 9:

Plaintiff's 1948 statement was not fraudulent because it contained legal conclusions only and was made in good faith.

Defendant's accusation that Plaintiff committed criminal fraud and other crimes when he signed his 1948 statement is legally defective on its face. It does not contain any allegation at all but deals with legal consequences and conclusions only. Moreover, he acted in an emergency situation under immediate threat to his very existence and was entitled to trust in the integrity and responsibility of New York counsel.

Conclusion.

It is respectfully submitted that, as a minimum, genuine relevant issues of fact still are open, unless they can already be deemed to be closed in Plaintiff's favor. It is therefore respectfully submitted that Defendant's second motion for summary judgment be denied.

Respectfully submitted.

Werner Galleski Attorney for Plaintiff

ENDORSED ORDER OF BONSAL, D.J. DATED DECEMBER 29, 1971 DENYING DEFENDANT'S MOTION

Endorsement

KURT SCHMIEDER v. LOUIS H. HALL, Jr. as Preliminary Executor of the Estate of HELEN B. DWYER 69 Civ. 1939

Motion #65 on 11/23/71

Defendant moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure dismissing the complaint.

By decision filed August 24, 1971, Judge Motley denied a prior motion by defendant for summary judgment "on the ground that there are many disputed issues of fact, including the central issue of whether the gift to Mrs. Dwyer was unconditional or subject to an alleged gentlemen's agreement between plaintiff and the law-yers." Earlier, Judge Frankel reached the same conclusion in denying defendant's motion to dismiss the complaint, pointing out that "Defendant's motion assumes the large burden of demonstrating 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The burden is not sustained."

Defendant now contends that the vesting of the property under the Trading with the Enemy Act cut off any interest of plaintiff, particularly when coupled with the plaintiff's statement made under oath at that time. It is true that a purchaser for value from the Alien Property Custodian would be protected from any claims by the enemy national. Here, however, Mrs. Dwyer was at all times a donee and not a purchaser, and plaintiff may be able to establish that he was still under restraint of the Communist authorities when he made his statement. On all the facts, plaintiff should be afforded an opportunity to prove an equitable interest in the property at trial.

Accordingly, defendant's motion for summary judgment is denied.

It is so ordered.

Dated: New York, N. Y.
December 76, 1971.

Del B. Boul

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHOOLEDER,

-8-

Flaintiff.

SUGGESTION OF INTEREST ON BEHALF OF THE UNITED STATES OF AMERICA

69 Civ. 1939 (WK)

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

Defendant.

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PLEASE TAKE MOTICE that upon the annexed affidavit of Irvirg Jaffe, Deputy Assistant Atterney General, and the Manorandum of Points and Authorities submitted herewith, the United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, hereby appears and files its suggestion of interest in the above-captioned matter pubmant to 28 U.S.C. §517.

:

:

Dated: New York, New York

March 11, 1975

PAUL J. CURRAN United States Attorney

By:

PRESERVE P. SCHAFFER
Assistant United States Attorney
Office & Post Office Address:
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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

X KURT SCHMIEDER, Plaintiff.

v.

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer.

Defendant.

69 Civ. 1939

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AFFIDAVIT OF IRVING JAFFE IN SUPPORT OF THE UNITED STATES' SUGGESTION OF INTEREST

CITY OF WASHINGTON SS: DISTRICT OF COLUMBIA

IRVING JAFFE, being duly sworn, deposes and says:

- 1. I am one of the Deputy Assistant Attorneys General in the Civil Division, Department of Justice. The duties and functions of the Alien Property Custodian were delegated to the Attorney General by Executive Order No. 9788 of October 14, 1946 (11 Fed. Reg. 11981). The Attorney General, in turn, delegated his powers and functions to the Assistant Attorney General in charge of the Civil Division, who is also the Director of the Office of Alien Property, 28 C.F.R. §0.47. In my capacity as Deputy Assistant Attorney General, I supervise and direct the activities and functions of the Office of Alien Property.
- 2. I make this affidavit on the basis of the documents and information in the files of the Office of Alien Property of the Department of Justice which I have reviewed.

It appears from the Department's records that in 1902 Kurt Schmieder, together with his father and brother, organized the Garfield Worsted Mills Co. in Garfield, New Jersey. All three were members of a large technical manufacturing company in Saxony, Germany. Kurt Schmieder worked with the Garfield firm until 1911 when he returned to Germany. In that same year the law firm of Putney, Twombly and Putney of which Mr. Louis H. Hall, Sr. was a member, became counsel for the Garfield Company. In 1918, the then Alien Property Custodian seized the German interests in the Garfield Worsted Mills. In 1928, pursuant to the enactment of the War Claims Act (45 Stat. 254), the property so seized was returned to Kurt Schmieder as the sole heir of his father. All or a substantial portion of that property remained in the United States.

Company was opened in the name of Mrs. Jenny Bochmann of Switzerland, containing securities of the estimated value of \$200,000. Mrs. Bochmann is a sister-in-law of Kurt Schmieder. In 1936 the securities in this account were transferred to the Stoneleigh Corporation of which Mrs. Bochmann became the sole shareholder. The corporation was organized by Louis H. Hall as a result of conversations between himself, a Mr. William G. Graupner, a former business associate of Mr. Kurt Schmieder, and Kurt Schmieder in Thuringia, Germany, in early 1935. In 1937, Mr. Hall was informed by Mr. Graupner that Mrs. Bochmann wished to dispose concer interest in the Stoneleigh Corporation.

Mr. Hall has stated that he always advised Mr. Graupner, whom he understood to be acting as an intermed ary, that there was no effective way of concealing German ownership of property in the United States and that the only way of divesting oneself of such ownership was by making an outright gift. This advice was conveyed by Mr. Graupner to Mr. Schmieder during a visit to Europe in the latter part of 1937. Upon Mr. Graupner's return he informed Mr. Hall that Mr. Schmieder wished to dispose of the property by way of gift to a person acceptable to Messrs. Hall and Graupner.

- 4. Thereafter, Mr. Hall prepared the necessary papers for execution by Mrs. Bochmann in Switzerland whereby the stock of the Stoneleigh Corporation was transferred to Mrs. Helen B. Dwyer, Mr. Hall's secretary, on March 30, 1938. Mrs. Dwyer dissolved the Stoneleigh Corporation on the same day and received the securities which constituted the assets of the corporation. Mrs. Dwyer filed a donee's gift tax information return in 1939 and paid the federal gift taxes from the assets of the corporation with the Bureau of Internal Revenue. Mrs. Dwyer retained the securities so received in a custodian securities account at the New York Trust Company.
- 5. In October 1941, Mrs. Dwyer, herself, reported to Foreign Funds Control of the Treasury Department, in the name of Jenny Bochmann, the shares of stock she, Mrs. Dwyer, held in the custodian account with the New York Trust Co. Mrs. Dwyer stated in her report that she

had received all of the stock of the Stoneleigh Corporation as a gift from Mrs. Bochmann and, through dissolution of the corporation, she held all its assets as her own, absolutely. Nevertheless, she stated as her reason for making the report that she bore no relationship to the donor, was unaware of the motive of the donor in making the gift or of the nature of the donor's title and, therefore, she deemed it appropriate to make a record of the matter by filing the report. The report was required only from persons in the United States who held any property in which a foreign national had any interest. Thereafter, the property so held by Mrs. Dwyer was blocked by the Treasury Department.

6. On December 15, 1948, by Vesting Order No. 12528, the Alien Property Custodian seized the property held by Mrs. Dwyer which she had received from Mrs. Bochmann on the finding and determination that such property was beneficially owned by Kurt Schmieder, an enemy national, residing in Meerane, Saxony, Germany. This determination was based in part on an investigation conducted by the Treasury Department both here and abroad and in part upon an affidavit executed by Jenny Bochmann in Switzerland on February 5, 1948, in which she stated that the assets and securities deposited in her name with the New York Tru. t Company belonged to her brother-in-law, Kurt Schmieder, a resident and citizen of Germany, that the assets and securities were deposited in her name until March 15, 1938; that she never had any interest in the Stoneleigh Corporation and that she executed certain documents all dated March 15, 1938, making an absolute gift of the

shares of the Stoneleigh Corporation to Mrs. Helen B. Dwyer of New York at the request of Kurt Schmieder's lawyer in New York.

- 7. In 1949, Mrs. Dwyer filed an administrative claim for the return of the property seized by Vesting Order No. 12528, (O.A.P. Claim No. 41938). In support of her claim she stated under oath that she was the owner of the property on the date of seizure; that her rights to the property were not subject to any conditions or encumbrances; and that to the best of her knowledge and belief the property she claimed was not held or used pursuant to any arrangement to conceal any interest of an enemy of the United States. The claim was also supported by an "affirmation in lieu of an oath" (Eidesstattliche Erklaerung) executed by Kurt Schmieder on June 1, 1946, in Germany, in which he stated "that the gift of Mrs. Bochmann's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dwyer is a voluntary, absolute and irrevocable gift, without any counter-obligation of Mrs. Dwyer."
- 8. Also in 1949, Mrs. Dwyer brought suit under
 Section 9(a) of the Trading with the Enemy Act against
 the Attorney General, seeking return of the property
 seized by Vesting Order No. 12528. (Dwyer v. McGrath,
 D.C.D.C. Civ. No. 1182-49.) In her complaint she alleged
 that she became the owner of the property on March 30,
 1938, and that at no time since that date had that property,
 or an interest vierein, been and or controlled, directly
 or indirectly, in whole or in part, by an enemy within the
 meaning of the Trading with the Enemy Act.

- 9. Mrs. Dwyer's suit against the Attorney General was settled extrajudicially on March 30, 1951, by a return to her of 55% of the seized property. The settlement was based not upon a lack of conviction by the Office of Alien Property that the determination of ownership by Kurt Schmieder was correct, but upon the unavailability of probative evidence to establish the cloaking scheme arranged by Kurt Schmieder, so as to defeat the claimed, absolute and unconditional gift from Kurt Schmieder to Mrs. Dwyer. At the time of settlement which was on the eve of trial) Kurt Schmieder was incarcerated in the Russian Zone of occupation in Germany and was, thus, unavailable as a witness. There was no reason to believe that Kurt Schmieder would disavow the absoluteness of the gift to Mrs. Dwyer, and Louis Hall, Sr. - perhaps the most important witness - was deceased.
- 10. As a result of a personal visit in May 1974 from James P. Duffy, III, Esq., and subsequent correspondence with Mr. Duffy, I learned of the pendency of the instant suit in New York, and I was informed that the Court wishes an expression from the Government with respect to its interest in the outcome of this action. I communicated the Department of Justice views to the Honorable Whitman Knapp, United States District Judge, by letter of June 28, 1974.
- 11. It is the Government's position that if as a result of some "gentleman's agreement" or other arrangement between Kurt Schmieder and his attorney, Mr. Hall, or with Mrs. Dwyer, the donee of his property in 1938 Kurt Schmieder retained any equities in the property, such

equities were lost upon vesting of the property by the Attorney General. These equities were not revived or reinstated upon return of part of the vested property to Mrs. Dwyer following the extrajudicial settlement. To hold otherwise would run counter to the express Congressional design, as embodied in the World War II amendments to the Trading with the Enemy Act, that all property interests of enemy nationals which masqueraded under innocent fronts in this country be reached. To allow an enemy national to enforce a cloaking arrangement by resorting to the courts would violate the letter and the spirit of the Trading with the Enemy Act. That Act has been on the statute books for almost 60 years, and embodies a firm public policy of the United States regarding enemy-owned property. It is an economic weapon to be used by the Government in times of war or of national emergency, as the national interest may require. A court of the United States should not lend its aid to an enemy national to circumvent the firm public policy of this country by enforcing a cloaking arrangement.

12. It has been suggested in the course of these proceedings that Kurt Schmieder is now an alien friend, and that any disabilities which he may have suffered under the Trading with the Enemy Act have now been removed. This view is wholly at odds with the decided cases which have uniformly held enemy status, once acquired, does not terminate when the war ends, or when a person who is an enemy by reason of residence in enemy territory moves to a neutral or friendly country. See, e.g., Swiss Ins. Co. v. Miller, 267 U.S. 42, 45 (1925); Bank voor Handel en

Scheepvaart, N.V. v. Kennedy, 288 F. 2d 375 (C.A.D.C. 1961), cert. den., 366 U.S. 962 (1961). In consequence, it is the Government's view that Kurt Schmieder's status as an "enemy" with respect to property vested during the late World War under the authority of the Trading with the Enemy Act has not been altered or removed by the passage of time. Kurt Schmieder had at no time standing under the Act to bring suit directly against the Attorney General to recover the seized property, and he may not accomplish that result by indirection by seeking to reclaim the vested property from a third person to whom the Attorney General released a portion of the vested property. See Munich Reinsurance Co. v. First Reinsurance Co., 6 F. 2d 742, 747, 751 (C.A. 2 1925).

13. In view of the overriding issues of public interest arising out of the administration of the Trading with the Enemy Act and the implementation of the policies embodied in that Act, the United States' views are hereby formally made of record by means of the present suggestion of interest, as authorized by 28 U.S.C. 517. Should Kurt Schmieder be held to be entitled to recover any part of the property in issue in this suit, the United States reserves to itself the right to proceed against him in a separate action to protect the integrity of the administration of the Trading with the Enemy Act.

Respectfully submitted,

Subscribed and sworn to before me this 4th day of March, 1975.

Hotary Public Schilt

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff,

v .

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

Defendant.

69 Civ. 1939

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' SUGGESTION OF INTEREST

STATEMENT

Plaintiff in this action is a national and citizen of the Federal Republic of Germany. He seeks to impress a constructive trust upon property of the Estate of the late Helen B. Dwyer, and accounting and return of such property to him. Plaintiff claims that certain property which he caused to be transferred to the late Mrs. Dwyer in 1938 pursuant to an "irrevocable and unconditional" gift was nevertheless subject to a "gentlemen's agreement" that the property would be returned to him at some future time.

There is no dispute that after World War II, the property in question was seized as enemy property by the Attorney General, in his capacity as successor to the Alien Property Custodian under the authority of the Trading with the Enemy Act, 50 U.S.C.

App. 1 et seq. (Vesting Order No. 12528 of December 15, 1948, 13 Fed. Reg. 8317). The Vesting Order was issued upon a finding that the property standing in the name of the late Mrs. Dwyer was beneficially owned by the plaintiff, an "enemy" within the purview of Section 2 of the Trading with the Enemy Act and pertinent Executive Orders.

It is equally uncontested that in 1949 the late Mrs. Dwyer sought a return of the vested property by means of a suit under Section 9(a) of the Trading with the Enemy Act, which she instituted against the Attorney General in the United States District Court for the District of Columbia (Dwyer v. McGrath, D.C.D.C. Civ. No. 1182-49). That suit was settled and compromised extrajudicially because of lack of probative evidence that the seized property was being "cloaked" for the benefit of an enemy national. As a result of the settlement, 55% of the value of the property held by the Attorney General pursuant to Vesting Order No. 12528 was returned to Mrs. Dwyer. The present suit has as its object a recovery of that property by the enemy national whose interest therein had been seized for the benefit of the United States.

ARGUMENT

I. The Scheme of the Trading With the Enemy Act

The Trading with the Enemy Act is "strictly a war measure . . . [finding] its sanction in the constitutional provision (article I, section 8, cl. 11) empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning capture on land

and water'." Stochr v. Wallace, 255 U.S. 239, 241-242 (1921).

Section 5(b) of the Act (as amended by Section 301 of the First
War Powers Act, 1941, 55 Stat. 838), confers upon the Executive,

"during the time of war or during any other period of national
emergency," broad powers to seize and transfer title to the
United States in "any property in which any foreign country or
a national thereof has any interest." In Section 5(b), Congress
furthermore directed that, "upon such terms and conditions as
the President may prescribe," the Executive is to hold, use,
administer, liquidate, sell, or otherwise seal with the seized

"interest or property" for the benefit of the United States.

The 1941 amendments to Section 5(b) of the Act, which defined the Executive's seizure powers, were designed to avoid the rigidity and inflexibility which characterized the Alien Property Custodian law as originally enacted during World War I (S. Rep. No. 911, 77th Cong., 1st Sess., p. 3).

As explained by the Supreme Court in <u>Clark v. Uebersee</u>

<u>Finanz-Korp.</u>, 332 U.S. 480 (1947), the amendment to Section 5(b)
in 1941 became necessary, because —

It was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral. They had through numerous devices, including the corporation, acquired indirect control or ownership in industries in this country for the purposes of economic warfare. Sec. 5(b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him "any property or interest of any foreign country or national thereof." The property of all foreign interests was placed within

reach of the vesting power, not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts. [332 U.S. at 484-485.]

Through various post-World War II amendments to the Trading with the Enemy Act, Congress directed the disposition of vested property. Section 32 of the Act, added by the Act of March 8, 1946, c. 83, \$1, 60 Stat. 50, permitted administrative return to certain classes of non-hostile persons who were nominal "enemies" under Section 2 of the Act; Section 34, added by the Act of August 8, 1946, \$1, 60 Stat. 9, provided for the payment of debt claims from the vested assets of enemy nationals to American creditors of those nationals. Sections 41-42, added by Pub. L. 87-846, Title II, \$205, 76 Stat. 1115, authorized the divestiture of remote future interests in certain types of property.

Section 39(a), added by the Act of July 3, 1948, c. 826, §12, 62 Stat. 1246, specifically provided that property of the Governments and nationals of Germany and Japan shall not be returned. The same legislation, in conjunction with subsection (d) of Section 39, required that the net proceeds of vested property be transferred to the so-called War Claims Fund, to be used to satisfy awards made under the War Claims Act of 1948, 62 Stat. 1240, 50 U.S.C. App. 2001, et seq.

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II. Upon the issuance of the Vesting Order, plaintiff retained no beneficial rights or interests in the property seized

It is established law that upon the issuance of a vesting order seizing property belonging to enemies, or in which enemies have an interest, such property becomes the absolute property of the United States, <u>Cumnings</u> v. <u>Deutsche Bank</u>, 300 U.S. 115, 121 (1937), and alien enemy owners are "divested of every right in respect of the money or property seized and held by the Custodian under the Trading with the Enemy Act." <u>Id</u>. at 120 (emphasis added), and cases there cited. See also <u>United States</u> v. <u>Silliman</u>, 65 F. Supp. 665, 673 (D.N.J. 1946).

In consequence, even if some "gentleman's agreement" had come into existence in 1938 between the plaintiff and the donee of his property respecting a future return of the property to the plaintiff, he lost all his equities in the property upon vesting.

These equities were not revived or reinstated upon return of part of the vested property to Mrs. Dwyer following the extrajudicial settlement. To hold otherwise would run counter to the express Congressional design, as embodied in the World War II amendments to the Trading with the Enemy Act, supra, that all property interests which masqueraded under innocent fronts be reached. For this Court to allow the plaintiff to recover any part of the property from the estate of the late Mrs. Dwyer would be tantamount to enforcing the cleaking arrangement which the plaintiff says he reached prior to the outbreak of World War II.

The Trading with the Enemy Act is permanent legislation which has been on the statute books for almost 60 years, and embodies a firm public policy of the United States regarding enemy-owned property. It is an economic weapon to be used by the Government in times of war or of national emergency, as the national interest may require. Its provisions may well have to be invoked at some future time. Aside from well-established equitable principles, this Court should not sanction the plaintiff's attempt here to circumvent the firm public policy of this country by means of the blatant cloaking device which he says he brought into being in 1938.

III. Plaintiff should also be denied equitable relief on grounds of "unclean hands"

Aside from the considerations of public policy just discussed, the plaintiff should also be denied the opportunity to assert an equitable claim against the estate of the late Mrs. Dwyer because of plaintiff's illegal conduct.

Plaintiff's claim is bottomed on the assertion that Mr. Hall, his former attorney, and Mrs. Dwyer have breached their "gentlemen's agreement" with him to preserve his property in the United States. If this assertion be true, it follows inexorably that plaintiff is seeking the aid of this Court in consummating his own illegal plan to violate the laws of Germany and of the United States. The placing of his securities in the name of his sister-in-law, in the first instance, was to avoid reporting his American property to the German authorities as required by German law. That was an illegal plan. In 1938, when he empowered Mr. Hall to draft the

necessary documents so that his sister-in-law could make an absolute gift of his property to any person acceptable to Mr. Hall and to his business associate, Mr. Graupner, he was not only furthering his illegal plan to evade German law but also insuring that his interests in property in the United States were concealed from American authorities. The plaintiff, it must be remembered, had suffered a seizure of his property under the Trading with the Enemy Act during World War I. In 1938, the war clouds over Europe were already discernible Even if concealment of his assets from the United States' authorities was not foremost in plaint ff's mind in 1938, he did nothing to bring his interests in his American property to the attention of the American authorities in mid-1941, when American Foreign Funds Control laws were specifically made applicable to Germany and its residents. (See Exec. Order No. 8389 of April 10, 1940, 5 Fed. Reg. 1400, as amended by Exec. Order No. 8785 of June 14, 1941, 6 Fed. Reg. 2897, also reprinted in 12 U.S.C. 95a, note.) In short, plaintiff appears in court with unclean hands and is attempting to utilize this Court as an instrument for giving effect to his illegal conduct. The Court should leave these parties where it finds them.

No maxim of equity is better settled but that those who come into a court of equity, see ing equity, must come with clean hands and a pure conscience. Manhattan Medicine Co. v. Wood, 108 U.S. 218, 227 (1883); Worden v. California Fig Syrup

Co., 187 U.S. 516, 528-533 (1903). And where a suit in equity concerns the public interest as well as the private interests of the litigants, the doctrine that he who comes into equity must come with clean hands assumes a greater significance, since it not only prevents a wrongdoer from enjoying the fruits of his transgression but also averts an injury to the public. Precision Co. v. Automotive Co., 324 U.S. 806, 815 (1945).

CONCLUSION

28 U.S.C. 517 confers upon the Attorney General an unconditional right to attend "to the interests of the United States" in any suit pending in a court of the United States. See also International Products Corp. v. Koons, 325 F. 2d 403, 408-00 (C.A. 2 1963).

The United States has an immediate and direct interest in the object of the present suit and in the relief which plaintiff seeks. The suit draws into issue the effect of a vesting order assued under the Trading with the Enemy Act upon property in which an individual, who was an enemy national at the time of vesting, asserts an interest. That issue transcends the interests of the private litigants to this action.

For the reasons heretofore set forth, we submit that plaintiff may not assert a claim in or to the property which was vested by

the United States, and that his suit should be dismissed.

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York

By:

FREDERICK SCHAEFER
Assistant U. S. Attorney
U. S. Court House
Foley Square
New York, New York 10007

Attorneys for the United States

Of Counsel:

IRVING JAFFE, Deputy Assistant Attorney General,

BRUNO A. RISTAU, Attorney, Civil Division, Department of Justice, Washington, D. C. 20530. UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff.

-V-

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HELEN B. DWYER, ANSWER TO INTERVENTION

69 Civ. 1939 (WK)

Defendant,

and

United States of America,

Intervening Party.

Comes now the plaintiff, KURT SCHMIEDER, and for his answer to the Intervention of the United States, styled as Suggestion of Interest of the United States of America, states as follows pursuant to F. R. C. P. Rule 24(c):

- 1. That he is without sufficient information to enable him to form a belief as to the allegations contained in the Affidavit referred to by the Intervention, and in the "Statement" of the Memorandum referred to by the Intervention, except that plaintiff admits that
 - stock of Garfield Worsted Mills Co. outright (a) owned or inherited by him, was vested in World War I and subsequently returned to him;
 - (b) Louis H. Hall Sr. (the late father and law partner of the defendant) was counsel to Garfield Worsted Mills
 - (c) a substantial portion of the returned property remained in the United States under the management of Louis Hall Sr. and William G. Graupner;

- (d) pursuant to their advice the fund was in 1934 placed into the name of Jenny Bochmann, plaintiff's late sister-in-law, and in 1936 transferred to Stoneleigh Corporation;
- (e) Stoneleigh Corporation was organized by Louis H. Hall Sr. and the defendant pursuant to plaintiff's instructions and Jenny Bochmann became its sole nominal stockholder upon plaintiff's direction;
- (f) after Bochmann in 1937 refused to "figure" any longer, Hall Sr. advised plaintiff through Graupner that the only way of divesting oneself of ownership of property in the United States was by making an outright gift "without any strings attached";
- (g) plaintiff thereupon agreed to conform thereto and to dispose of the property by way of gift to a person acceptable to Messrs. Hall Sr. and Graupner;
- (h) Hall Sr. prepared the necessary papers and at his request Bochmann executed them in Switzerland, whereby the stock of the Stoneleigh Corporation was transferred to Mrs. Helen B. Dwyer (the deceased defendant herein, who was a secretary and a client to, Hall Sr. up to his death in 1949 and thereafter to the present defendant);
- (i) no gift tax return was filed relative to any gift running from plaintiff to Dwyer;

- (j) a fraudulent donee's gift tax return was filed by

 Dwyer in 1939 relative to a non-existing gift from

 Bochmann to Dwyer, after Bochmann refused Hall

 Sr's request that she sign such return;
- (k) in conformity with legal advice consistently received, plaintiff subscribed to the "statement in lieu of oath" dated June 1, 1948, as submitted to him by Graupner's emissary and under the impact of Communist persecution;
- (1) at the time of the settlement bewteen Dwyer and the Attorney General, plaintiff was incarcerated for purported crimes against the Communist economy;
- (m) plaintiff had no equities in Mrs. Dwyer's property
 as of the time of its vesting in 1949 nor at the time
 of the settlement between Dwyer and the Attorney
 General, but the surrounding circumstances gave
 rise to an obvious and adjudicated inference of
 undue influence which, in combination with future
 facts, was apt to give rise to a future accrual to
 him of a cause of action for fraud, which has never
 been vested;
- (n) plaintiff had a gentlemen's agreement with Hall Sr. and Graupner in the sense that all participating persons would always feel to be bound by eternal rules of decency, morality, and equity (as contradistinctive from law);

- in the within fraud action calls for remedial quasi
 in rem relief against the property in issue as of the
 time when the retention of the proper v by the
 defendant (or Dwyer) became unconscionable, which
 time was subsequent to 1949 and also subsequent
 to the settlement between Dwyer and the Attorney
 General.
- 2. Plaintiff respectfully refiles his Complaint hereto filed in this cause and adopts by reference as though incorporated herein all of the allegations of the Complaint herein.

AS AND FOR A FIRST COMPLETE AND AFFIRMATIVE DEFENSE TO THE INTERVENTION

3. That the United States is estopped from making its claim here in by reason of its procedural support of the defense of the defendant, thus negating, and endeavoring to destroy, and burdening plaintiff with additional legal expense to assert, the "equity" as to which it asserts an interest herein, and that there is no thinkably stronger method of enforcing the enemy property administration, by way of deterrent to future offenders, than to deprive all persons involved in "cloaking" from any fruits thereof.

AS AND FOR A SECOND COMPLETE AND AFFIRMATIVE DEFENSE TO THE INTERVENTION

4. That any "equity" retained by plaintiff in Mrs. Dwyer's property, if it was subject to the 1949 Order vesting that property

upon determination that it was beneficially owned by plaintiff, became automatically divested by Trading With The Enemy Act, Sec. 41, since it was a right or interest of plaintiff in an estate, trust, or remainder, vested after December 7, 1941, which had not become payable or deliverable to and had not vested in possession of the Attorney General prior to December 31, 1961. Under #13 of the Affidavit forming part of the intervening pleading herein, the property claimed by the United St. tes is not even deliverable to it at the time of pleading as yet inasmuch as it is contingent upon plaintiff's being "held to be entitled to recover any part of the property in issue in this suit".

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE TO THE INTERVENTION

5. That the United States is barred by laches from making its claim herein in that plaintiff's "equity" was obvious and adjudicated prior to the settlement between Dwyer and the Attorney General and the United States still postpones its action for recovery up to a determination of the within action.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE DEFENSE TO THE INTERVENTION

6. The integrity of the enemy property administration requires a release of the fund herein to plaintiff by reason of his eligibility for return of vested property under Trading With The Enemy Act, Sec. 32. Plaintiff suffered Nazi discrimination as to liberty and property by reason of his political creed as member of a non-conformist group of the "Stahlhelm", which went underground when its majority was in 1934 incorporated into the Nazi Storm Troopers. In a prior adverse

in regard to an other fund, this issue was not litigated and there were violations of due process. Plaintiff was examined without assistance of counsel. Hall Sr. and his associates failed to investigate plaintiff's group membership background. They were in contact with plaintiff's counsel representing him in regard to the other fund and were clearly hampered by their conflict of interest relative to the present fund. Under the equity maxim of deeming as having been done what ought to have been done, plaintiff merits to be put into the same position as he would occupy if his attorneys had been loyal and diligent. Under the doctrine of primary jurisdiction plaintiff proposes that this issue be referred for initial investigation by the Office of Alien Property and be then reviewed by this Court.

AS AND FOR A FIFTH COMPLETE AND AFFIRMATIVE DEFENSE TO THE INTERVENTION

overpowering influence of over plaintiff, their client, and over Dwyer, their secretary and client. Under such influence Dwyer made testamentary and intervivos disposition of the gift property in favor of the Hall family from 1940 on. Hall Sr. and the defendant controlled practically every phase of her occupational, financial and personal life so as to make her a helpless tool in their hands. These matters and the identity of defendant and his two sisters as the ultimate takers of the gift property became known after Dwyer died on May 16, 1970. One of her statutory distributees was an incompetent and the New York County Surrogate's Court appointed a special guardian to investigate the probate background. A copy of the report of the special guardian is attached hereto as Exhibit "A".

8. The taking of plaintiff's property by officers of this
Court under the guise of serving the functions of enemy property
administration has a cancerous indication prejudicial to the integrity
of such administration. Plaintiff submits that the eradication of such
erosion from within, as a matter of public policy, takes first priority
so as to foreclose the United States from assisting, and cooperating
with the defendant for the purpose of preserving for him and his
sisters the spoils of their wrong-doing.

BY WAY OF CROSS-CLAIM AGAINST THE UNITED STATES

- 9. This cross-claim is brought against the United States
 pursuant to Trading With The Enemy Act, Sec. 9 a, for return of the
 fund herein to plaintiff.
- 10. The subject-matter jurisdiction of this Court is invoked under the said Sec. 9 a, and the <u>in personam</u> jurisdiction under the appearance of the United States herein.
- 11. Plaintiff, a national and resident of the Federal Republic of Germany, is an alien friend, entitled to recover hereunder his property as vested by the Suggestion of Interest of the United States of America, dated March 11, 1975.

12. The fund herein is a remedial product of plaintiff's fraud action against the defendant herein.

13. The fund herein, in its legal nature, is separate and distinct from Mrs. Dwyer's property as was vested in 1949.

14. Mrs. Dwyer's property (as far as presently concerned) was divested in or about 195! by her settlement with the Attorney General.

15. Any equity retained by plaintiff was automatically divested as pleaded in # 4 hereinabove.

16. Less than two years have expired from the vesting of the f nd herein on March 11, 1975. Plaintiff was the sole pre-vesting owner and still is the sole owner thereof.

17. The claim made by the United States concerning the fund herein is without warrant of law and in violation of the Constitution of the United States.

WHEREFORE, plaintiff prays on his cross-claim for a judgment declaring him to be the sole owner of his within fraud action and any constructive trust impressed thereunder, together with the costs of this action.

Werner Galleski Attorney for Plaintiff Address: 450 Park Avenue New York, N.Y. 10022

Phone: 371 9040

SURROGATE'S COURT : COUNTY OF NEW YORK

Probate Proceeding, Will of

Deceased. :

File No. 4663/1970

REPORT OF HELEN B. DWYER, : JAMES P. DUFFY, III, : GUARDIAN AD LITEM OF LOIS A. LUCAS, AN INCOMPETENT

TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK

I. JAMES P. DUFFY, III, an attorney at law duly admitted to practice in the State of New York, do hereby make the following report as Guardian ad litem of Lois A. Lucas, an incompetent residing at Central State Hospital, Indianapolis, Indiana.

Nature of this Proceeding

This is a probate proceeding. By petition dated July 21, 1970, Louis H. Hall, Jr., now residing at 115 Lone Tree Farm Road, New Canaan, Connecticut, the petitioner in this proceeding (hereinafter called "the Petitioner"), requests a decree herein admit 'ng a certain written instrument dated September 9, 1966 (hereinafter called "the 1966 Will"), to probate as the last will and testament of Helen B. Dwyer, deceased, late of New York, New York, and directing that letters testamentary issue to him. By order of this Court dated August 6, 1970, the petitioner was issued preliminary letters testamentary.

Jurisdiction

By order of this Court dated September 24, 1970, I was appointed Guardian ad litem for Lois A. Lucas, an incompetent, for whom a committee, Shirley Lucas Scott, of Racine,

Wisconsin, has been appointed. My consent to act as such Guardian ad litem and my affidavit of no adverse interest have been executed and filed in this Proceeding.

I have examined the proofs of service of the Citation herein on file with the Clerk of this Court and have found that they show due and timely service of such Citation upon my Ward and her committee. I have acknowledged service upon me of the Citation herein and have filed my notice of appearance with the Clerk of this Court.

Interests of My Ward

My Ward is a child of the Decedent's sister, Frances
Mullikia Atkinson, who is now deceased. My Ward, therefore,
is a niece of the Decedent. My Ward, her brother, and her two
sisters are the only known distributees of the Decedent (the
brother and two sisters of my Ward are hereinafter called
"the Distributees"). If the Decedent is intestate as to any
property, my Ward would take one quarter of such property.

My Ward has no interest under the 1966 Will since she is not named therein. The Distributees are likewise not named in such instrument.

The Decedent

The Decedent was born in Connersville, Indiana, on October 21, 1895; her parents were George E. Mullikin and Mary Berry Mullikin She had a brother, Earl Edward Mullikin, and a sister, Frances Mullikin Atkinson, both of whom are now deceased. After the death of her mother in 1898, the Decedent was raised by her aunt and uncle, Alice Mullikin McIntosh and Edwin L. McIntosh (neither of whom are apparently in any way related to Adelaide Hall McIntosh, the Petitioner's

younger sister), who also resided in Connersville. See
Special Guardian's Exhibit No. 11 for Identification (such
Exhibits are hereinafter cited as G-). I am advised by
Hannah A. Montgomery, a niece of the Decedent, that the
Decedent's brother and sister were each raised by other aunts
and uncles who also resided in the general vicinity of
Connersville. The Decedent left Connersville in 1914 and
went to Washington, D. C., where she found employment.
According to the Petitioner, at the time she left Washington,
D. C. to come to New York City, she was employed by the Alien
Property Custodian. About this same time, the Decedent married; there were no children from this marriage. This marriage apparently terminated in divorce in 1927 and it appears
that the Decedent never remarried. It also appears that the
Decedent's husband died in 1938.

In 1929 the Decedent moved to New York City where she was employed by the law firm of Louis H. Hall, Sr. (here-inafter called "the Father"), the father of the Petitioner. Thereafter, she worked as the Father's personal secretary until his death on November 17, 1949. It is assumed, although it is not known, that the Decedent first met the Father while she was in Washington, D. C. See Transcript of Examination of Louis H. Hall, Jr., page 7 (such Transcript is hereinafter cited as T-.). During the course of her employment, the Decedent, through the Father's efforts received a substantial gift from one of the law firm's clients, Kurt Schmieder. Whether or not this gift was an absolute gift, as concerns Mr. Schmieder, need not be determined in this proceeding; however, Mr. Schmieder has commenced an action in the U.S. District Court for the Southern District of New York (File

No. 69 Civ. 1939) claiming that the Decedent held the subject matter of this gift as his nominee and subject to a moral obligation to return it to him. Mr. Schmieder has demanded, among other things, an accounting from the Decedent. This same question arose in a different context in an action that the Decedent commenced in the U.S. District Court for the District of Columbia (File No. Civil 1182-49) to recover those of her assets, including the "Schmieder gift" that had vested in the Attorney General, as successor to the Alien Property Custodian, on December 12, 1948.

During the approximately twenty years while the Decedent was employed as the Father's personal secretary, she developed a social relationship with him and members of his family. She was an occasional visitor to his apartment in New York City, his country home in New Canaan, Connecticut, and his summer home in Madison, Connecticut. The Decedent undoubtedly had an opportunity to meet the Petitioner and his two sisters on certain of these occasions; however, the Petitioner has testified that his older sister no longer resided with his parents from the early 1930's since she was in college at that time and married shortly thereafter. The Petitionen testified that this would also be true for himself and, to a lesser extent, for his younger sister. It is not clear whether the purpose of these visits was social or business or partially both. The Petitioner has testified that there was frequently a dual purpose for these visits. T-18. The Decedent took an extended European trip with the Father and his wife. Again, there is a suggestion that the Decedent accompanied the Father to assist him on business matters. It does not seem possible,

therefore, to determine, based on the facts available to me, whether the relationship between Decedent and the Tather would have existed independent of their business relationship.

ably upon the Father for both legal and business advice.

The Petitioner stated in his affidavit sworn to July 21, 1970 (hereinafter called "the Putnam Affidavit), that the Father prepared various wills for the Decedent. c.f. T-40. Presumably, the testamentary instruments prepared by the Father for the Decedent all named certain descendants of his as residuary beneficiaries. See Petitioner's Exhibit 8d for Identification (such Exhibits are hereinafter cited as P-).

The Father's law firm also undertook to represent the Decedent in connection with various difficulties arising out of the aforementioned gift. The extent to which the Father directly participated in these matters is not known with certainty; however, I am advised by George C. Pendleton, one of the attorneys who was at that time associated with the Washington, D. C. law firm that assisted in these matters, that certain of the I ther's partners, particularly Frederic R. Sanborn, were substantially involved.

When the Father died, the Decedent became the Petitioner's personal secretary and remained so until she retired in 1953. Her responsibilities as the Petitioner's personal secretary apparently varied little from her responsibilities as the Father's personal secretary. Except for one year's salary payable over two years, it does not appear that the Decedent received a pension; she apparently received social security benefits.

In the Putnam Affidavit the Petitioner states that

he prepared three wills for the Decedent and that, in each of these wills, he and one or both of his two sist rs were named as residuary beneficiaries. The Petitioner further states in the Putnam Affidavit that he arranged to have a Massachusetts attorney prepare an inter vivos trust for the Decedent and that this same attorney also prepared an amendment to this trust and a new will (which was never executed) for the Decedent after this attorney submitted drafts to her which she approved. The Petitioner further notes that he and his two sisters were named as remaindermen of the trust and as residuary beneficiaries of the unexecuted will. While my examination does show that the Massachusetts attorney did in fact prepare the instruments indicated by the Petitioner, my examination cannot support the conclusions suggested by the Petitioner in the Putnam Affidavit. The Massachusetts attorney has advised me by telephone and later confirmed to me by letter that he received no instructions concerning the dispositive provisions of the trust or the will directly from the Decedent and that any such instructions came to him through the Petitioner who purported to be acting on the instructions of the Decedent. In my examination of the Petitioner, these points were clarified and will be amplified in great detail later in this report. The Massachusetts attorney can in no way be considered an independent attorney. Contrary to the Petitioner's suggestion, I would conclude that in addition to the three wills that the Petitioner states he prepared, that he also prepared a trust of which he and his two sisters were remaindermen and into which the Decedent placed substantially more than half of her property, an amendment to the trust, and a will that was never executed

by the Decedent.

Like his father, the Petitioner held, at all times from about 1950 until the time of her death, the Decedent's general power of attorney. The Petitioner also held special bank powers to write checks on her checking accounts, but apparently not her savings account, and had access to her safe deposit box. The Petitioner also gave the Decedent financial advice—see for instance, the Petitioner's diary entry for November 1, 1968; however, e did not feel that he was her financial advisor.

The Petitioner engaged in several financial transactions with the Decedent. The first of these transactions, a loan from the Decedent of \$14,500 at four percent interest for the purpose of acquiring real property in Stamford, Connecticut, and constructing a home thereon, occurred shortly after the "Schmeider gift". The loan was evidenced by a demand note and collateralized by a Quit Claim Deed on the Stamford property and other negotiable securities. Shortly thereafter, the amount of this loan was increased by \$1,500 to \$2,000 on account of unanticipated increases in construction costs. The Petitioner testified that he did not solicit any other source for these funds and that either he or his father prepared all the documents relating to the transaction. T-23. The Petitioner repaid this loan after the Decedent's property was vested in the Attorney General primarily because the Attorney General was not willing to continue it on the terms extended by the Decedent. In 1946 the Decedent made a loan of approximately \$1,750 to the Petitioner that was evidenced by a demand note with interest. The Petitioner could not recall the purpose of the transaction or who initiated it.

loan was repaid in July 1949. In 1949 the Decedent also made a loan of \$5,781.75 to the Petitioner for the purpose of acquiring 100 shares of International Salt Company common stock. The Petitioner initiated the transaction, prepared the underlying demand note, and did not solicit the loan of these funds from any other source. At the time of her last illness, the Petitioner withdrew several thousand dollars from the Decedent's checking account and deposited it in his personal account. The Petitioner stated that he did this so that he would have funds immediately available for the Decedent's emergency needs. The Petitioner testified that he has accounted for these funds to the Decedent's estate.

The nature of the relationship between the Petitioner and the Decedent can not be described as a close one and, similar to the Father, appeared to evolve out of their business, rather than social, needs. The Petitioner has testified that he can recall only one time, approximately twenty years ago, when the Decedent was a guest at his home and only occasional and infrequent meetings at the Decedent's apartment and elsewhere. It is interesting to note that, although the Decedent had made fairly regular visits to some of her relatives in Indiana and took extensive trips to Europe, the Far East, and elsewhere, the Petitioner testified that the reason for the Decedent's not visiting his home more often was her dislike for the train ride from New York City to his home -- a trip of approximately one hour that the Petitioner, and many commuters like him, took almost every business day.

Although invited, the Decedent did not attend the weddings of the Petitioner's children but he believes that she

probably sent a gift. The Decedent was not in the practice of spending holiday seasons with the Petitioner and his family nor was she in the practice of sending presents to him or his family at Christmastime, birthdays, wedding anniversaries, and the like. The Petitioner, however, believes that he and his wife regularly sent the Decedent presents of casual value at Christmastime. The Petitioner does not believe that his children were well acquainted with the Decedent and vice versa. T-320.

The relationship between the Decedent and the Petitioner's sisters does not appear to be overly strong, particularly in the case of the Petitioner's elder sister, Virginia Hall Webb. The Petitioner testified that Mrs. Webb was not as close to the Decedent as he and his younger sister. Mrs. Webb did not appear as a beneficiary in the will that the Petitioner prepared for the Decedent in 1955 and probably not in earlier wills, as well. It does not seem that Mrs. Webb corresponded or otherwise communicated with the Decedent and probably had not seen the Decedent for many years prior to the Decedent's death. The Petitioner's younger sister, Adelaide Hall McIntosh, did maintain a fairly regular correspondence with the Decedent which correspondence shows a mutual fondness. See P-9 to P-19. The Decedent made a gift of an undisclosed amount to this sister, some time in 1968, for the purpose of making a trip to Europe. It does not appear that Mrs. McIntosh had seen the Decedent for a considerable period before the Decedent's death although there is correspondence that indicates that the Decedent had been invited to Mrs. McIntosh's home and vice versa.

After my Ward became incompetent, approximately

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twenty years ago, there did not seem to be any contact between her and the Decedent. It does not appear that the Decedent maintained a very close relationship with any of the Distributees. There were the usual Christmas cards with notes included, occasional letters and occasional visits when the Decedent was in Connorsville. In addition, the Distributees have advised me that the Decedent would usually advise them of her itinerary for the many trips that she took. The most recent contact of any consequence between the Decedent and the Distributees was on the occasion of the death of the Decedent's brother in October 1965. The Decedent asked the Distributees to attend to a number of matters relating to her brother's, their uncle's, funeral which they did. Regretably, the Distributees and the Decedent's second cousins were not in the habit of saving the correspondence they received from the Decedent so I did not have an opportunity to review it as I did in the case of the Petitioner's younger sister.

The Decedent did maintain a fairly close relationship with Stella Davis, the daughter of the aunt who raised her, and also with Robert Davis and Sue Davis Harris, the children of Stella Davis. She apparently visited with these persons on a fairly regular basis and named one or more of them in each will that I have seen including the 1966 Will. The Decedent apparently had confidence in Robert Davis, since, by letter of instruction dated August 26, 1966, she asked him to distribute certain items of her personal property to various individuals named in the letter.

The Decedent obviously felt a special affection for Connersville, Indiana, as is evidenced by her instructions to the Petitioner. She wished no funeral services in New

York but rather wished to have a simple service in Connersville and to be buried there in the family cemetary plot.

Presumably, her family was, therefore, very much on her mind about the time she executed the 1966 Will. This is further evidenced by her letter dated September 7, 1966 (two days prior to the execution of the 1966 Will), G-11, to the Petitioner wherein she lists her only blood relatives known to her as well as their current addresses.

Dispositions Under the 1966 Will

As noted previously, the instrument makes no provision for my Ward or any of the Distributees. The 1966 Will generally provides as follows:

- (1) bequeaths a diamond ring to the Petitioner's younger sister or her son;
- (2) bequeaths the remaining personal property to the aforementioned Robert B. Davis to be distributed in accordance with the Decedent's wishes as she may express them to him;
- (3) bequeaths \$5,000 each to the aforementioned Stella Marie Davis (this has lapsed since Mrs. Davis did not survive the Decedent), Robert B. Davis and Sue Davis Harris and Sarah Verdi, a friend of the Decedent;
- (4) bequeaths \$10,000 to Amherst College in memory of the Father; and
- (5) be meaths and devises the residue in three equal parts one part to each of the Petitioner and his two sisters or their issue, and in default thereof, to Amherst College.

Preparation of the 1966 Will and Prior Wills

It would appear that the Decedent executed at least eight wills and one codicil subsequent to the time that she received the "Schmieder gift" and that each such instrument was prepared by or under the direction of the Father and/or the Petitioner. The Petitioner has produced a file copy of a letter dated October 28, 1948, P-8d, that purports to be a letter from the Decedent to Alfons B. Landa, Esq., an attorney involved in the representation of the Decedent before the Office of Alien Property at the time her property vested in the Attorney General. Although it cannot be determined who in fact was the author of this letter (and for that reason I do not consider this letter to be admissible in evidence), the letter purports to show an intention at that time on the part of the Decedent (if, in fact, the Decedent is the author) to make certain dispositions to the Hall family:

"I would like to point out that I am and always have been deeply appreciative of all benefits I have derived from my association as Mr. Hall's [the Father] secretary and have felt that with the exception of limited family responsibilities I wanted my property to go to certain descendants of his. And I certainly feel very keenly since I received the gift in question that I wanted most of my property to go to such descendants of Mr. Hall's. The expression of such feeling has been the general tencr of my various wills."

It should also be noted that the letter also shows an intention to take care of certain family responsibilities.

In 1955 the Petitioner prepared a will for the Decedent that he characterized as a "revised" will since he thought that it changed only a provision or two of a prior will that he no longer retains or has any knowledge of.

The provisions of that will were substantially similar to the provisions of the 1966 Will except that the residue was

divided in) two parts, one part outright for the Petitioner and one part in trust for his younger sister.

The Petitioner has few recollections of the events surrounding the preparation and execution of this will. The only changes that the Petitioner recalls with any certainty, are an additional \$10,000 bequest to Amherst College in memory of his father, the nomination of Morgan Guaranty Trust Company of New York as successor executor and trustee, and the designation of Amherst College as a contingent remainderman of the residuary trust for the benefit of his younger sister. Since he could not recall the provisions of the will immediately preceding this will, he could not recall whether he was named as the Decedent's executor for the first time. The Petitioner believes that there were conferences with the Decedent concerning these changes; however, he cannot recall when they occurred or what actually transpired at such conferences, except that he has a recollection of the Decedent inquiring into the adequacy of the bequest to Amherst College. The Petitioner's recollection as to any instructions that he may have received at any such conferences can best be summed up by the following question and answer that appear in the transcript of my examination of the Petitioner at page 54:

"Q You received instructions from Mrs. Dwyer. What did you do when you received those instructions?

A I don't know if I can state it any more clearly than I have. I'm sure that I wrote them out, probably in longhand. I'm sure it was longhand, either on a copy of the will that she had given me, or on riders to be attached, if there were new material then I would have discussed it with her, probably in person, but I can't

recall exactly."

The Peritioner may have reviewed the entire will, since he claims it was his usual practice so to do, to determine whether it still met the requirements of current good quality legal thought. He is certain however that he would not have reviewed the will with any other attorney in his office.

The Petitioner does not know whether he was present at the execution of this will but he is certain that he made arrangements with other attorneys to attend to its execution

to act as subscribing witnesses since he was to receive a bequest under it. The Petitioner stated that he made every effort to keep the terms of the will confidential since he believed that the Decedent did not wish her affairs to be disclosed to anyone else at his office.

The Petitioner did not deal with the Decedent as a client on this matter and did not charge her a fee for his services in connection with the preparation and execution of the will. In the Petitioner's own words, he "dealt with her as a very close friend, practically as a relative."

In 1963 the Petitioner again prepared a will for the Decedent. This will was substantially similar to the 1966 Will except that the residue was divided into three parts, one part outright to each of the Petitioner and his older sister and one part in trust to his younger sister.

Again the Petitioner's recollection of the events surrounding his preparation and the execution of this will are vague. The Petitioner is not sure how the Decedent advised him that she wished to make revisions in her 1955 will but he is sure that she did tell him that she wanted further revisions. The Petitioner does not remember the

instructions that he received from the Decedent concerning these revisions nor can he recall whether she asked for any advice in connection with the principal revisions relating to the addition of the Petitioner's older sister, Virginia, as a beneficiary of one-third of the residue and the trusts for the benefit of the issue of any deceased residuary beneficiary. Neither can the Petitioner recall presenting the Decedent with a draft of the proposed will or discussing any such draft with her; however, he believed that this was done since this was his usual practice. Similar to the 1955 will, the petitioner is quite certain that he did not involve any of his partners or associates in the preparation of this will since he believed the Decedent wished the matter to be kept private. The circumstances of the execution of the 1963 will appear to be substantially similar to the circumstances of the execution of the 1955 will.

In 1966 the Decedent, again, asked the Petitioner to prepare a will. It appears that on July 8, 1966, see G-2, the Decedent asked the Petitioner to bring her a copy of her will and a certain letter of instructions since she felt a need to change the letter of instructions in view of her brother's death the preceding year. She also indicated that there were several matters that she wished to discuss with the Petitioner. Apparently, a conference or conferences ensued and it was decided that the Decedent's will should be redrawn. Outside of the deletion of the detailed provisions for trusts in the event that a residuary beneficiary predeceased the Decedent leaving issue who survived the Decedent, the principal change from the previous will was that the bequest to the Petitioner's younger sister of one-third of the residuary was

left outright to her rather than in trust. The Petitioner has no actual recollections or memoranda of any conference or conferences concerning the 1966 will nor has he any written instructions from the Decedent regarding the disposition of the residue. His diary entries from July 8, 1966, up to and including September 9, 1966, the day on which the 1966 will was executed, show a total of one hour of time devoted to the Decedent's affairs, one half hour of which was recorded for September 9, 1966. When asked further about this, the Petitioner allowed that it was possible that he could have spent more time or possibly even less time with the Decedent on this matter than was shown in his diary.

The Petitioner is certain, and the basis of his certainty is his usual practice, that the Decedent did, in fact, receive prior to her executing the 1966 Will, a copy thereof and that she reviewed it and was satisfied with it. In support of his contention that this did in fact happen, the Petitioner points to a letter, G-11, dated August 26 (the year, 1966, has been added by the Petitioner at some subsequent but undetermined time) which states in part, "My will, of course, expresses my desires as to disposition of my assets." It would appear from the circumstances, that the Decedent could not be talking about the final draft of the 1966 Will. According to the Petitioner's own testimony and to information received from Mr. Hicks of the firm of Hicks & Sturges, the law firm where the execution copy of the will was typed, such instrument could not have been in Mr. Hall's possession prior to the evening of September 8, 1966.

The Petitioner has testified on several occasions and has also included in the Putnam Affidavit that the Decedent

was an extremely thorough, highly trained and skilled legal secretary. This makes three typographical errors in the 1966 Will all the more curic s. On page 1, line 4 of Article Fourth, the word "Lafayette' should be "Plainfield". The Decedent's letters dated August 26, 1966, and September 7, 1966, to the Petitioner, G-11, show Robert Davis's address as Plainfield, Indiana, and not Lafayette, Indiana. On page 1, line 3 of Article 7 the word "Milliken" should be "Mullikin". This was the Decedent's maiden name. On page 3 of the instrument there is a line, "and we at her request and in her presence", missing from the attestation clause. The Petitioner testified unequivocally that the Decedent "had gone into this ritual [of executing a will] many times, and she knew the ritual very well".

The errors in Article Fourth and Seventh raise some curious and difficult problems. At some later, and as yet undetermined, date the Decedent did in fact have an opportunity to review the 1966 Will and at that time, she did notice these errors and changed them in her own hand. See G-36. The conclusion is fairly strong, therefore, that, when the Decedent executed the 1966 Will on September 9, 1966, she had not read it. The conclusion is also fairly strong, in the case of the error in Article Fourth, that the Decedent had not read the draft from which the 1966 Will was prepared prior to August 26, 1966.

Other Testamentary Instruments Subsequent to the Instrument dated September 9, 1966

In 1968, shortly after Kurt Schmieder wrote the Decedert requesting a meeting, the Decedent apparently sought the Petitioner's help to establish a self-administering fund

ing her assets which now amounted to very close to \$1 million. The Petitioner, therefore, purporting to be acting on the instructions of the Decedent, undertook to have an intervivos trust created in Massachusetts by a Massachusetts attorney of his choosing. The remainder provisions of this trust were substantially parallel to the remainder provisions of the 1966 Will.

Similar to his recollections of his actions in connection with the 1955 will, 1963 will and the 1966 Will, the Petitioner's recollection of any instructions that he may have received from the Decedent with respect to the establishment of this trust are vague. The Petitioner has a recollection of meeting the Decedent at her apartment some time during the summer of 1968. He recalls, in a general way, that, although the Decedent enjoyed managing her property, she was afraid that she could not continue to do so in the event of illness or accident and, therefore, she wanted to place the substantial bulk of her fortune in an inter vivos trust so that it would be self-administering. The Petitioner believes that the Decedent asked him to be a trustee of such a trust; however, he testified that he declined since he "already had enough in the way of trusts and estates that [he] was handling, and [he] would also have been the Trustee for [himself] in some respect because she wanted the terms of the trust, after her life, parallel those of her will".

At some later time, the Petitioner recalls securing the services of a Massachusetts attorney not only to prepare the trust instrument itself but also to serve as a cotrustee of the trust with the Decedent's stock broker. Thereafter,

the Petitioner wrote this attorney with instructions concerning the preparation of the proposed trust stating that he was instructed to do so by the Decedent. The Petitioner recalls that such instructions were oral and he cannot recall precisely when he received them. The Massachusetts attorney prepared a proposed draft of trust agreement and sent it to the Petitioner. The Petitioner claims that he reviewed the draft with Decedent although he cannot recall how he transmitted, if at all, the draft to the Decedent or when he may have done so. His basis for his belief is his letter dated November 26, 1968, G-26, to the Massachusetts attorney wherein he states: "I have gone over the proposed Trust Agreement of Mrs. Dwyer', and a diary enery on November 21, 1968, that he went to the Decedent's apartment and had a conference with her concerning financial and other matters. Although the Peti 1 believes that this statement is accurate (and in view of his consistent practice means that he transmitted the draft to the Decedent and discussed it with her), he subsequently questioned the accuracy of another statement in this letter. T. 72. Thereafter, the Massachusetts attorney sent execution copies of the proposed trust agreement to the Petitioner who apparently transmitted them to the Decedent for execution. The Massachusetts attorney's files do not indicate whether he received the copies of the executed Trust Agreement from the Petitioner or from the Decedent; however, he acknowledged their receipt to the Petitioner.

Approximately one year later, the Decedent again sought the Petitioner's help to amend her trust and also to prepare a new will. Again, the Petitioner undertook to have these instruments prepared by the same attorney who prepared

the original trust agreement. The circumstances of the Petitioner's involvement in these matters are generally similar to the circumstances of his involvement in the preparation of the Decedent's trust.

There is a curious inconsistency in the Petitioner's account of the preparation of the first draft of the unexecuted 1970 will. The Petitioner has suggested that he reviewed a copy of the 1966 Will with the Decedent and that he and she made certain changes thereon in pencil. The Petitioner then suggests that this draft, G-36, was forwarded to the Massachusetts attorney so that he could prepare the 1970 will from it. Although the Exhibit clearly shows the errors on page 1 corrected in the Decedent's own handwriting, the first draft of the 1970 will contained the same errors on page 1 thereof as appeared on the 1966 Will which would suggest that Decedent had not in fact made any changes on the copy of the 1966 will at the time it was first transmitted to the Massachusetts attorney.

I have discussed with the Massachusetts attorney what instructions he may have received directly from the Decedent concerning the dispositive provisions of any of the instruments that he prepared. This attorney has advised me that he received no instructions concerning the dispositive provisions of any of the instruments that he prepared directly from the Decedent. All instructions were transmitted to him by the Petitioner, who purported to be acting upon the instructions of the Decedent.

Assets of the "Schmieder Gift" May Be Traceable

I have examined the list of securities that the

Decedent wished to include (and later did include) under he trust and have compared it with the list of securities that the Decedent did not wish to include under her trust. With all but several exceptions, the securities included under the trust were acquired by the Decedent in the early 1950's and a significant portion of them are the same securities that she received from the Attorney General, as Successor to the Alien Property Custodian upon settlement of the above-mentioned action against the Attorney General. In contrast to the securities that the Decedent included under her trust, the securities that she withheld from her trust were all acquired by her subsequent to August 26, 1965. None of these securities appear to be related to any of the securities that the Decedent received from the Attorney General on the above-mentioned settlement.

During the course of the Decedent's litigation with the Attorney General, her attorneys moved for summary judgment. file in that proceeding is an affidavit in opposition to this motion by Hermine-Herta Meyer, an attorney for the Department of Justice, sworn to October 9, 1950, wherein Miss Meyer discusses, based on her examination into the facts, the history of the "Schmeider gift". Miss Meyer wrote as follows:

". . . Mr. Schmeider finally concluded to go through with the gift and left the selection of the donee to Mr. Graupner and [the Father] . . .

"Finally, [the Father] selected his secretary, [the Decedent,] as the recipient of the gift."

Miss Meyer wrote further that although the gift was purported to be absolute, the Decedent

"remained in the employ of [the Father], until his death, at a salary of approximately \$50 per week;

none of the income or proceeds of the property was ever put into her personal savings account, but was kept in a separate account in another bank; and that, as stated in her affidavit, she used only about \$2,000 a year of this property valued approximately \$200,000."

On the oral argument of this motion, Judge Holtzoff in denying Decedent's motion stated:

"If the case were on trial before me, I should be inclined to hold on the undisputed evidence that [Decedent] has no beneficial title. Here is a stenographer in an office who gets an assignment of property of a client of the office of the value of \$200,000. She does not know the original donor. She does not use the property or spend any of it. There is some inference to be drawn that she is only a straw. . . there is a serious question in my mind whether she has a beneficial interest in that property."

The words of Miss Meyer and Judge Holtzoff are no less relevant here. We are again confronted with a set of facts which create several inferences which are, to say the least, most curious.

Current Status of Mr. Schmieder's Action

Kurt Schmieder, in his action in the U.S. District Court for the Southern District of New York, is claiming that his assets were transferred to the Decedent in 1938 subject to a moral obligation to return his property to him when the situation in Germany stabilized itself. I expressed no opinion, at the time, as to the relative merits or demerits of Kurt Schmieder's cause of action or whether Kurt Schmieder ought to be permitted to intervene in this proceeding. I do believe, however, that the Court should be mindful of the fact that, should Mr. Schmieder succeed in his District Court action, he, in all likelihood, will leave the estate without assets, except, in that event, the Decedent's estate may have a claim against the Petitioner. I do not believe, however, that this is a proper subject to be considered in this report.

Impact of the "Schmieder Gift" Upon the Decedent

Petitioner's Exhibit 8d for Identification would seem to indicate that the Decedent was quite grateful to the Father for his arranging the "Schmieder Gift"; however, the gift did not confer upon her all the benefits that she may have originally anticipated. The Petitioner has testified that the gift turned out to be a "nightmare" for the Decedent for a number of years because "she was accused of fraud and lying in at least three specific instances". T-90. The Petitioner has a recollection of the Decedent saying that she felt she had paid a high price for this so-called gift.

Due to the nature of the transfer, the gift also made the Decedent extremely dependent upon the Father and the Petitioner. During the period preceding the settlement of her action against the Attorney General, the Decedent had to rely almost entirely upon the Father and the Petitioner to substantiate her claim that the gift was in fact absolute and without condition, expressed or implied. If, at any time, the Father or the Petitioner waivered in their support of the Decedent, the Decedent faced the certain loss of the gift as well as potential criminal sanctions for filing false statements with the Federal government. The re-emergence of Kurt Schmieder and his lawsuit once again placed the Decedent in a position of dependence upon the Petitioner to support her claims. Should the Petitioner have waivered at all in that support, the Decedent's ability to defend her position would have decreased materially.

Although the Petitioner testified that the Gift was a "nightmare" to the Decedent for only a number of years, it would seem that the "nightmare" never really ceased. As long

Kurt Schmieder was alive, there was always the possibility that he would assert his claim as, in fact, he did shortly before the Decedent's death. Mr. Schmieder's continuing interest and efforts to locate the Decedent were no doubt a constant source of concern to her.

Role of the Petitioner With Respect to the Decedent and During My Investigation

My examination of the Petitioner was very much frustrated by his inability in many instances to recall all but the most cursory details of his dealings with the Decedent. On occasion his recollection was actually a rationalization of what he thought his actions must have been based upon the evidence of the result. The files, such as he kept, were incomplete and of little or no assistance to him or to me in reconstructing the events that transpired between them. If he kept any records of or wrote any memoranda of any conferences that he may have had with the Decedent concerning her dispositive intentions, they cannot be found or be identified as such. He apparently never sought any written expression from her that she was aware of her right to receive independent counsel on the question of her dispositions to himself and his sisters but that she nevertheless wished him to prepare her wills or trust.

The Petitioner stated that he did not know, previous to these events, that, under ancient and well established
precedents of New York law, he had the obligation of coming
forward in the first instance with a clear and convincing
explanation of his involvement in these matters sufficient to
dispel any inference of undue influence. The Petitioner also
stated that he, at the time of his preparation of the 1966

Will, had no familiarity with the long standing and substantial body of case law dealing with the obligations of attorneys who prepare wills for clients wherein they are named beneficiaries. I would hope that the Petitioner's prior activities and present conduct flowed from a fundamental misunderstanding of or lack of knowledge of the well settled obligations that the long standing precedents of this State imposed upon him when he, as a lawyer, undertook to prepare the various instruments that would have, and may still, benefit him so greatly.

The Petitioner's Conduct Should Excite the Suspicion of the Court

My investigation shows that there are numerous confidential and/or document relationships between the Decedent and the Petitioner. The Petitioner was, for many years, the Decedent's employer. The Petitioner held, for approximately twenty years, the Decedent's general power of attorney, had special banking powers to draw checks on her accounts, had discretionary authority over her stock brokerage account, and had access to her safe deposit box. The Petitioner gave financial advice to the Decedent and, although he disclaims it, he may have been her financial adviser. The Petitioner and his Father were instrumental in arranging for the "Schmieder Gift" to the Decedent that enabled her to live very comfortably; the Petitioner's support was vital to the Decedent should Mr. Schmieder appear and assert his claim. And, of course, the Petitioner was also the Decedent's attorney. Surrogate Page, in a well written review of the available precedents concluded:

"Pertinent precedents are very strongly to the effect that, in any case where the chief beneficiary of an

allegedly testamentary document happens to have, in the alleged testator's lifetime, occupied some sort of relationship toward him which is generally, rather loosely, denominated as 'dominant', the instrument, because of this circumstance, is regarded as 'suspicious'. Such relationships, other things being anywhere near normal, do not include close kinship. In many instances wherein the issue of undue influence is presented, there is no consanguinary connection, but some relationship such as master and servant, clergyman and parishioner, physician and patient or attorney and client." Matter of Anderson, 149 N.Y.S.2d 109 (Sur. Ct. Broome 1956) at page 112.

In view of these many so-called "dominant" relationships, suspicions would, therefore, exist, although perhaps to a lesser degree, even if the Petitioner were not the attorney who drafted his own bequest in the 1966 Will.

The Petitioner has acknowledged that he is the attorney who prepared the 1966 Will that is offered for probate herein and contends that those provisions of the instrument that leave the Decedent's residuary estate to himself and to his two sisters resulted solely from the love and affection of the Decedent for himself and his two sisters and were in no way brought about by any influence on his part. In support of his contention, the Petitioner has filed with this Court an affidavit sworn to July 21, 1970 (previously called "the Putnam Affidavit"), in keeping with the holding in Matter of Putnam, 257 N.Y. 140 (1931), in an effort affirmatively to come forward in the first instance to rebut the inference of fraud and undue influence that attains under the circumstances. Judge Crane speaking for a unanimous Court of Appeals held:

". . . Attorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer. Any suspicion which may arise of improper influence used under the cover of the confidential relationship may thus be avoided. The law, recognizing the

delicacy of the situation, requires the lawyer who drafts himself a bequest to explain the circumstances and to show in the first instance that the gift was freely and willingly made. (Matter of Smith, 95 N.Y. 516.) 'Such wills, when made to the exclusion of the mural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof should be required beside the factum of the will before the will can be sustained.' (Marx v. McGlynn, 88 N. Y. 357, 371.) In the absence of any explanation a jury may be justified in drawing the inference of undue influence, although the burden of proving it never shifts from the contestant. (Matter of Kindberg, 207 N. Y. 220, p. 228.)" Matter of Putnam, supra, at page 143.

Absent a satisfactory explanation on the part of an attorne, draftsman-beneficiary, the trier of the fact may find, on that fact alone, that a will was the product of undue influence.

Matter of Hayes, 49 Misc. 2d 152, 267 N.Y.S.2d 452 (Surr. Ct., Bronx 1966). Surrogate McGrath in denying probate to a will under circumstances that have many interesting parallels to the present situation wrote:

"This contested probate proceeding was tried before the court without a jury. The propounded instrument is dated February 8, 1960 and the decedent, a spinster, was about eighty years of age when she died on June 19, 1965. Under the terms of her will, testatrix gave two legacies of \$500 each to a priest for the purpose of having Masses said for herself and her predeceased sister. The remainder of her estate she bequeathed in equal shares to the at orney-draftsman of her will and the attorney's son, with the latter being named as the executor. The residuary legatees were not related to the decedent.

"The decedent's sole distributees, four nephews and nieces, have filed objections to probate. They allege that the propounded instrument was not properly executed, that the decedent lacked testamentary capacity and that the paper writing was the product of the fraud and undue influence of the attorney-draftsman and his son.

". . . .

"There remains for determination, the question of the fraud and undue influence allegedly practiced upon the decedent when the attorney-draftsman caused the testatrix to execute a will in favor of himself and his son. After the proponent had completed his proof concerning the factum of the alleged will, he rested his case. At this point in the trial, in the usual situ-

ation, where undue influence is alleged, it would now be incumbent upon the contestants to come forward with their evidence of undue influence as an affirmative assault on the validity of the will, since they have the burden of proof on this issue. However, the contestants also rested their case at this point of the trial and offered no affirmative proof whatsoever that the propounded paper was the product of the undue influence of the attorney-draftsman and his son. Although the burden of proving undue influence never shifts from the contestants [citations omitted], where, as in this case, a client makes a will in favor of her lawyer to the exclusion of the natural objects of her bounty, such will is looked upon with great suspicion by the law and, in the absence of a satisfactory explanation, the trier of the facts is warranted in drawing an inference of undue influence [citation ommitted]. This inference of undue influence is rebuttable [citation omitted].

"In view of the rule laid down in the Putnam case, it is the opinion of this court that, in addition to the factum of the will, it was incumbent upon the attorney-draftsman to come forward and explain the circumstances under which he became a principal beneficiary of decedent's will; and to show that no unfair advantage was taken of his client and that the alleged gift was freely and willingly made [citation omitted].

"This duty of explanation was cast upon the attorney-draftsman and, since he elected to proffer no explanation of any kind to repel any inference that the confidential relationship between the parties had given rise to any improper influence, on the present state of the record, the court is compelled to draw an inference of undue influence by the attorney-draftsman [citation omitted]. Accordingly, even though there was no direct or affirmative evidence of undue influence, the court holds that the propounded paper was procured and executed through the undue influence exerted upon the decedent by the attorney-draftsman. The propounded paper will be denied probate." Matter of Hayes, supra, at page 453 et. seq.

Judge Cohn speaking for the Appellate Division, First Department, clearly demonstrated the long standing rule that, while New York courts have uniformly adhered to the practice of viewing all circumstances such as present themselves here with suspicion, they have, for good cause shown, lifted the cloud of doubt where the attorney-draftsman-beneficiary has clearly and convincingly shown that the suspicion is unfounded:

"Here we do not find any affirmative proof of undue influence nor do we find sufficient facts which

would warrant an inference that appellant exerted undue influence upon the testatrix. Appellant, in addition to proving the factum of the will, gave a satisfactory explanation of his relationship with the deceased which repelled any inference that the confidential relationship between the parties had given rise to any improper influence. The will, so far as the record shows, was the free, untrammeled and intelligent expression of the intentions of the testatrix. Since she had no blood relatives, it does not seem unnatural that she should favor her friend and adviser of long standing. Gratitude, esteem or friendship which induces another to make testamentary disposition of property cannot ordinarily be considered as arising from undue influence and all these motives are allowed to have full scope without in any way affecting the validity of the act." [citation omitted]. Matter of Wharton, 270 App. Div. 670, 62 N.Y.S.2d 169 (A.D. 1st 1946) at page 172.

Evidence of Prior Consistent Testamentary Intentions Does Not Dispell Undue Influence

The Petitioner has obviously placed great reliance upon the succession of prior wills. Each of these wills apparently evidences the Decedent's intention to leave the substantial bulk of her property to the Petitioner and one or more of his sisters. A history of prior wills, in and of itself, is not sufficient, as a matter of law, to establish the absence of undue influence. Matter of Zimmerman, 254 App. Div. 630, 3 N.Y.S.2d 212 (App. Div. 4th 1938); Matter of Carter, 199 App. Div. 405, 191 N.Y.S. 551 (App. Div. 3d 1921); Matter of Forsyth, 169 Misc. 1042, 9 N.Y.S.2d 642 (Sur. Ct. N.Y. 1938); Matter of Satterlee, 281 App. Div. 251, 119 N.Y.S.2d 309. (App. Div. 1st 1953); Matter of Kaufmann, 20 App. Div. 464, 247 N.Y.S.2d 464 (App. Div. 1st 1964); aff'd, 15 N.Y.S.2d 825, 257 N.Y.S.2d 941 (1965). Quite to the contrary, such circumstances may show a scheme to acquire the Decedent's property, Matter of Carter, supra; Matter of Kaufmann, supra, or serve to illustrate how completely the Petitioner was able to dominate the will of the Decedent. Matter of Kaufmann, supra.

The Petitioner likewise place: great reliance upon the fact that the remainder provisions of the Decedent's trust closely parallel the provisions of the 1966 Will. This parallelism should not, as a matter of law, establish the absence of undue influence. Matter of Zimmerman, supra; Matter of Carter, supra; Matter of Forsyth, supra; Matter of Satterlee, supra; Matter of Kaufmann, supra. The existence of the trust and the circumstances under which it was prepared may instead show a lack of confidence on the part of the Petitioner in the validity of the 1966 Will. Matter of Carter, supra; Hagen v. Sone, 174 N.Y. 317 (1903); Matter of May, 184 Misc. 336, 55 N.Y.S.2d 402 (Sur. Ct. N.Y. 1944). Judge Kellogg's questions appear particularly appropriate here:

"... Why was the transfer made? The property had already been given to Mr. Pike under the Smith will, which would take effect at her death, and the reservation of the life estate gave him no use of the property until her death. Did he still have some lingering doubt about the Smith will?" Matter of Carter, supra, at page 560.

Matter of Carter, supra, is also of interest because of the characteristics of Mr. Pike, the beneficiary found to have exerted undue influence:

"The residuary clause in the will speaks of his 'careful attention to me and my affairs.' Apparently she had the right to trust Mr. Pike; to her knowledge he stood high in the community. He was a director and vice president of one of the principal banks, and president of the board of education, treasurer of the Y. M. C. A., a member and officer of the Methodist Church, and was apparently a man to be trusted in every respect, and she was in a position to confide in and trust him." At page 554.

Decedent's Knowledge, or Lack Thereof, of Contents of 1966 Will is Immaterial

During the course of my investigation, the Petitioner and his attorneys have contended that the Decedent was well aware of the contents of the 1966 Will at the time she executed it. Although I dispute this contention, assuming for the moment that it is correct, rather than dispelling a showing of undue influence, it may show more clearly the deep rooted influence of the Petitioner over the Decedent. Since the very essence of undue influence presumes that the Decedent was deprived the free exercise of her will, it is immaterial whether the Decedent knew the contents of the 1966 Will or that she executed it with full knowledge of its contents.

Tyler v. Gardiner, 35 N.Y. 559 (1866); Matter of Forsyth, supra; Matter of May, supra; Matter of Smith, 95 N.Y. 516 (1884). Judge Porter's commentary is appropriately in point:

". . . When the antecedent and surrounding circumstances are grouped in their appropriate relations, they carry to the conscience and the understanding the clear conviction, that, when the mother affixed her signature, she was executing the daughter's will. It is no sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument, and assented to all its provisions. This was the precise purpose, which the undue influence was employed to accomplish. That consideration was urged in the case of Bridgman v. Green; but Lord Chief Justice Wilmot very properly replied, that it only tended to show, more clearly, the deep-rooted influence obtained over the testator. He added, 'In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect with the deed or the will, are very material; but in cases of undue influence and imposition, they prove nothing, for the same power which produces one, produces the other.' (Wilmot 70.) In the case of Huguenin v. Baseley, Lord Eldon said, 'The question is, not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced.' (14 Ves. 299.) In a case somewhat analogous to the present, where the relations of the parties were reversed, and the execution of a deed was obtained by undue influence of the parent over the child, Judge Emott said, 'If the mind of the donor was brought to a parpose, preconceived by the parent, for his own sole advantage, by an influence which she could not escape, in the circumstances in which she was placed, and which was deliberately used to effect such a purpose, then that influence, or its exercise, was undue and improper.' (31 Barb. 25.)." Tyler v. Gardiner, supra, at page 595.

on the Question of Undue Influence

The Decedent's 1955 will 1963 will 1966 Will and unexecuted 1970 will each contain bequests to one or more of the Decedent's first cousin, Stella Davis, her secon cousins, Robert Davis and Sue Harris, and her friend, Sarah Verdi.

These bequests seem to be natural and do show some freedom of action on the Decedent's part with respect to her testamentary intentions. This freedom of action, however, has no bearing on the ultimate question of whether the remainder provisions of the 1966 Will were procured through the fraud and undue influence of the Petitioner. Surrogate Foley, speaking for this Court, held:

"Nor is it at all significant that some of her relations and certain charities were mentioned as legatees in the papers. It is not unusual in cases where undue influence is exerted that a plausible pretense of freedom of action on the part of the testator is lent to the paper by the inclusion of other legatees who might be the proper objects of bounty. Such a device is mere camouflage of an attempt to conceal the greater benefits passing to the person exercising undue influence."

Matter of May, supra, at page 405.

An analysis of the drafts from which the Decedent's 1966 Will and the unexecuted 1970 will were prepared shows that the Decedent had made changes thereon in her own hand-writing. In both cases these changes related only to those provisions relating to the bequests for her so-called "natural beneficiaries". These notations appear on the first page of the copy of the 1966 Will that was used as a draft for the unexecuted 1970 will. Similarly, these changes appear on the first page of the copy of the 1963 will that was used as a draft for the 1966 Will. The Decedent's handwriting does not appear on the subsequent pages of either draft and all of the remaining notations appear to be those of the Petitioner.

Perhaps the Decedent did not have the opportunity to review the remaining pages of the draft, or, if she had the opportunity, perhaps she had no interest in doing so. The latter circumstance, which appears more likely, requires a further question as to why the Decedent would be unconcerned with the remainder provisions of her will. A comparison of the 1963 will and the 1966 Will shows a substantial change in the remainder provisions from the former to the latter. While the 1963 will is highly detailed and provides trusts for descendants of the primary beneficiary in the event that he should predect the Decedent, the 1966 Will is relatively simple and contains no such trust provisions; in addition, the share previously left in trust to the Petitioner's your ser sister is left to her outright.

Certainly, changes such as these, particularly since they dealt with the disposition of the significantly greater portion of the Decedent's estate, should have been, in the normal case, a matter of great concern and interest to her and yet it appears they were not. Although these provisions conferred considerable benefits on himself and others in his family, the Petitioner professes little or no recollection of discussing them with the Decedent. The Petitioner suggested that the reason for excluding his older sister from the 1955 will was that she was financially better off than he and his younger sister. The Petitioner suggested that his older sister was included in the 1963 will because her situation had worsened. It would appear that, although the residuary provisions were of very little interest or concern to the Decedent, they were highly motivated by the needs of the Hall family which, I suspect, were far better known to the

Petitioner than the Decedent. When these and other circumstances are grouped in their proper relationship, the trier of the fact may very well conclude that the Decedent was so influenced by the Petitioner that she had little or no interest in or concern for the remainder provisions of her will and that she was incapable of forming an independent testamentary intention with respect to those provisions.

The Petitioner's Competence and Reputation are not Issues To Be Considered

The Petitioner, in his oral explanation in favor of the 1966 Will, has placed great reliance upon his usual or consistent practice. In the ultimate analysis, this is to do little more than to place his credibility, and competence and reputation as an attorney at issue. While the competence and reputation of independent attorneys may be relevant on the issue of undue influence, this is not dispositive and so held the Court in Matter of Kaufmann, supra, at page 684:

"The fact that the instrument offered for probate was prepared by reputable, competent attorneys is a relevant circumstance but does not preclude a finding that the undue influence here involved was active, potent and unaffected by the interposition of independent counsel."

Where the attorney is also the beneficiary, his competence and reputation are of little value on the question of undue influence and may actually serve to confuse the trier of the fact by leaving the impression that a career hangs in the balance. The admonition of the Appellate Division, Second Department, is in point:

". . . Because a new trial is required it is appropriate to suggest that the emphasis in the charge concerning the principal beneficiary's professional reputation and success at the Bar would have been better omitted lest a jury misconstrue its purpose. . . "

Matter of Carpen, 15 A.D. 2d 760, 224 N.Y.S.2d 751

(App. Div. 2d 1962) at page 752.

There is substantially no conflict of opinion that in will contests, as in a jury trial, where multiple inferences may be drawn from the same circumstances, the resolution of these inferences must be left to the trier-in-fact, usually the jury. Matter of Anna, 248 N.Y. 421 (1928); Hagen v. Sone, supra, Matter of Wood, 253 App. Div. 78, 300 N.Y.S. 1268 (App. Div. 3d 1937); Eckert v. Page, 161 App. Div. 154, 146 N.Y.S. 513 (App. Div. 1st 1914). Conclusions

Based on my examination into the facts and circumstances surrounding the preparation and execution of the 1966 Will, I feel compelled to object to its admission to probate as the last will and testament of the Decedent. The inferences of fraud and undue influence that may properly be raised within the context of ancient and well established precedents and the consequences that flow therefrom are of such proportion that they may only be resolved by a jury in a formal proceeding to determine whether or not the explanation offerei by the Petitioner is adequate to dispell these inferences. I recommend that, in the best interests of my Ward and in the interests of preserving Estate assets, independent proceedings be commenced forthwith against the inter vivos trust that the Decedent established under an agreement dated December 30, 1968, between herself, as Donor, and Winslow L. Obber and John S. Whipple, as Trustees, to secure the assets thereof for the benefit of the Estate. I further recommend that the Petitioner be removed from office as preliminary executor.

Dated: March 26, 1971

James P. Durfy M

(3)

MOTION BY ORDER TO SHOW CAUSE TO JOIN THE GOVERNMENT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

825a

KURT SCHMIEDER,

Plaintiff,

ORDER TO SHOW CAUSE

-against-

Civil Action No. 69 Civ. 1939 (WK)

LOUIS H. HALL, JR., as preliminary executor of the Estate of HELEN B. DWYER,

Defendant.

UPON the accompanying affidavit of James

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UPON the accompanying affidavit of James P. Duffy, III, sworn to May 29, 1975, the accompanying memorandum of law, and upon the entire record before this court, it is

ORDERED that the United States and the Attorney

General of the United States show cause before the Honorable

Whitman Knapp, United States District Judge, Southern District

of New York, United States Courthouse, Foley Square, New York,

New York, Courtroom No. 10, on the Aday of June 1975 at

Cipho'clock on said date, why an order should not issue joining

the United States or the Attorney General of the United States

as a party to this action pursuant to Rule 19(a), Fed. R.

Civ. P., and why a further order should not issue pursuant

to Rule 56, Fed. R. Civ. P., granting summary judgment for

plaintiff to the extent that any claim by the United States or

the Attorney General of the United States against plaintiff

is barred by the provisions of 50 U.S.C. App. §41, and it is

order, the aforementioned affidavit, and memorandum of law on the United States Attorney, Southern District of New York and Mortin J. Turchin, Esq., Messrs. Turchin & Topper, 60 East 42nd Street, New York, New York 10017 and John S. Martin, Jr., Esq., Messrs. Martin, Obermaier & Morvillo, 1290 Avenue of the Americas, New York, New York 10019 on or before June 7, 1975, and in the following manner:

Personal Service, shall be deemed sufficient service of this order. Insurering Papers by June 10th House New York, New York 10019 on Papers by June 10th House New York, New York 10019 on Papers of the Service of this order. Insurering Papers by June 10th House York New York, New York 10019 on Papers by June 10th House York

United States District Judge

AFFIDAVIT OF JAMES P. DUFFY III IN SUPPORT OF MOTION

| UNITED | ST | AT | ES | DI | ST | RI | CT | CO | URT |
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| SOUTHER | N | DI | ST | RIC | T | OF | NE | W | YORK |

----X

KURT SCHMIEDER,

Plaintiff,

Civil Action No.

-against-

69 Civ. 1939(WK)

LOUIS H. HALL, JR., as preliminary executor of the Estate of HELEN B. DWYER,

Defendant.

----X

STATE OF NEW YORK)

(ss.:

COUNTY OF NASSAU)

JAMES P. DUFFY, III, being duly sworn, says

that:

(1) I have been retained by Werner Galleski, Esq., as trial counsel for plaintiff in this action, and submit this affidavit in support of Schmieder's motion to join the Attorney General or the United States as a party to the action, and for summary judgment holding that any Government claim against Schmieder predicated upon facts developed in this action is barred by the provisions of 50 U.S.C. App. §41.

Background

(2) Plaintiff in this action seeks to impress a

constructive trust, upon equitable principles, against the property of the estate of one Helen B. Dwyer. Plaintiff Schmieder is a citizen and resident of the Federal Republic of Germany, butlived and worked in the United States for several years in the early 1900's. He returned to his birthplace in Germany in 1911 and left behind in the United States various securities and bank deposits. The original defendant in the action, Helen B. Dwyer, was a citizen and resident of the state of New York and died on May 16, 1970. The present defendant in the action is Schmieder's former counsel and executor and fiduciary of Dwyer's estate.

Schmieder consulted his New York counsel, Louis H. Hall, Sr., and his son, Louis H. Hall, Jr., and a New York friend, as to how he might prevent the Nazis in Germany from marshalling his assets in the United States for the purposes and objectives of the Nazi regime. He received advice from counsel (including the present defendant) with regard to finding a way to protect his assets. Upon the advice of the New York counsel, Schmieder transferred his cash and securities to Dwyer, who was a secretary of the New York attorneys, and whom Schmieder had never met or heard of before. In so doing, Schmieder relied upon Hall's opinion that the transfer of the assets would be impregnable as a matter of law

and would leave a mere moral obligation on the part of Dwyer to return the property to Schmieder after the emergency situation created by the Nazis, and the foreseeable World War II, had passed.

- (4) During World War II Schmieder had no communications with anyone in the United States and upon the end of the war he was sentenced to prison for anti-communist activities in the Russian occupied zone of Germany where he lived.
- No. 12528, the Alien Property Custodian seized the property held by Mrs. Dwyer upon its assumption that the property was beneficially owned by plaintiff. In 1949 Mrs. Dwyer filed an administrative claim for the return of the property, and also brought suit under §9(a) of the Trading with the Enemy Act against the Attorney General of the United States seeking the return of the property seized by the vesting order. Mrs. Dwyer's suit against the Attorney General was settled in 1951 by the return to her of 55% of the seized property.

Joinder of the United States or the Attorney General

(6) Rule 19(a)(1), Fed.R. Civ. P. provides that a person shall be joined as a party in the action, if in the person's absence, complete relief cannot be accorded among those who

are already parties. The United States appeared in this action by filing a suggestion of interest by the United States Attorney for the Southern District of New York, and a Deputy Assistant Attorney General, Civil Division, United States ... Department of Justice, who, by delegation pursuant to executive order and other delegations, supervises and directs the activities and functions of the Office of Alien Property. The Government asserts in its suggestion of interest and appearance that it possesses a contingent remainder interest in any constructive trust impressed by the court in this action. We submit to the court that complete relief in this case cannot be accorded plaintiff without joinder of the United States or the Attorney General, since complete relief would have to include a judgment pertaining to the absence of any right to the estate funds, such as the contingent remainder presently claimed by the Government. Since plaintiff's interest in the outcome of this lawsuit and the United States' asserted interest, are inseparable as far as an adjudication of the duties of a constructive trustee, including surcharges, is concerned, plaintiff and the United States have a united interest in the outcome of the case, and joinder is further warranted.

(7) Rule 19(a)(2), Fed. R.Civ.P. provides that a person may be joined in an action if the person claims an

interest relating to the subject in the action and is so situated that the disposition of the action in his absence may impai. c impede his ability to protect the interest, or will leave parties initially in the action subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the person's claimed interest. It is clear that if the Government is not joined in the action, plaintiff Schmieder would be subjected to a second lawsuit commenced by the United States, thus resulting in a multiplicity of litigation. (Jaffe affidavit, ¶13). Plaintiff's contention is accented by the fact that he is in poor health, 88 years of age, and would lose an opportunity to obtain and present evidence of defendant Hall and the United States in regard to the facts of this case. We further submit that a separate adjudication of plaintiff's interest, apart from an adjudication of any contingent remainder interest of the United States, would as a practical matter impair or impede the ability of the United States to protect its claim in that it would not be a party to the accounting on the constructive trust. Further, it is now apparent that no equitable settlement of this case can be achieved without it being made known, by a judgment of this court, whether the United States does in fact have a cognizable claim against Schmieder under the Trading With The Enemy Act if he prevails in this action against Hall.

- United States as a juridical entity may be formally joined in this action by an order of the court since it appeared herein when it filed its suggestion of interest, and any "sovereign immunity" defense that it may have to a counterclaim would not necessarily prohibit the court from declaring that its alleged claim against Schmieder is barred by 50 U.S.C. App. §41.
- (9) It is also clear that the Attorney General of the United States may properly be joined as a necessary party in view of his acknowledged administrative and enforcement duties under the Trading With The Enemy Act. In addition the Attorney General, or for that matter, the United States, would not deprive the court of subject matter jurisdiction, since it could be founded upon 28 U.S.C. §\$1331, 1361 and 50 U.S.C. App. §9. Relief could and should be afforded plaintiff pursuant to the Administrative Procedure Act, the Declaratory Judgment Act, mandamus and other injunctive relief, and upon principles of equity that can be applied by the District Court.

Summary Judgment Against the Government

(10) The contingent remainder interest claimed by the United States does not by its terms, as defined by the suggestion of interest, become vested in

possession until plaintiff recovers against Hall in this case. Up to that point in the future, the United States represents to be committed under the 1951 settlement with Dwyer to honor the "absolute" ownership of the fund by defendant. Thus, it would be totally inconsistent for the United States to claim any title in possession over the fund in this action prior to an adjudication in plaintiff's favor.

(11) The estate, precedent to plaintiff's equitable interest in the fund, consisted of the title held by Mrs. Dwyer to the fund. That title remained absolute and unexposed to equitable reproach and scrutiny until facts occurred which aroused the conscience of equity and classified her further retention of the fund as an unjust enrichment and fraud within the meaning of equitable principles. Even if the United States' opinion, manifested in the suggestion" of interest that the events from 1938 on created some equitable nucleus which harbored inchoate equities, identifiable as some kind of contingent interest, within a far stretched interpretation of that term as of the time of vesting of the property (1949) as well as the time of divesting (1951), then any such nebulous "equity" could in no event have reached the heights of a remainder vested in possession until and unless the conscience of equity to an accrual

plaintiff's fraud action against Dwyer and Hall. To be sure, this equitable fraud arose by reason of the abuse of the fiduciary relationship between plaintiff and the Halls, and thereby also with Mrs. Dwyer herself. Only after and not before the arousal of the conscience equity, did the further retention of the fund by rear result in her unjust enrichment at Schmieder's expense. Plaintiff vehemently disputes that there was some agreement or intent between he and Dwyer, whom he never met, or that there was a preexisting manifested intention or agreement for Dwyer to return the fund. Plaintiff simply maintains that he possesses a fraud -- redressing remedial right to sue for the impression of a constructive trust on the fund.

men's agreement" would ever come to pass between Dwyer and plaintiff was undiscernable up to the capstalization of all-factual circumstances which indicated that it became unconscionable for Dwyer to retain the fund. The same result would incidentally, also be reached if the assertions in the suggestion of interest, in its interpretation of the 1938 "gentlemen's agreement" as a cloaking method to keep plaintiff's property undiscovered through the perils of World War II that were foreseen by Schmieder. Even under such speculative auspices, plaintiff was entitled to follow

Hall's advice in the way in which the United States understands it to be given (Jaffe affidavit ¶¶3,4,5). That is to say, that the transfer of absolute title to the property to a United States citizen by "divesting ones self of... ownership" and "making an outright gift" was an "effective way of concealing German ownership of property in the United States". This still amounted to some kind of fiduciary arrangement, under implied reasonable terms as to time and circumstances, pursuant to which Dwyer held a precedent estate of absolute title until Schmieder became entitled to exercise some contingent remainder therein. However, it i apparent that these circumstances would not ripen into plaintiff's right to possession of the fund until all requisite terms had been met.

homogeneous fundamental concepts of arrangements, plaintiff's right became vested in possession only after he had traced and located Dwyer in 1967 and asked her for an accounting. It was only then that all the equitable prerequisites to this lawsuit came into existence. Thus, at the earliest, in 1967 plaintiff's remainder became vested in possession. By that time, the divestiture under 50 U.S.C. App. §41 had operated to divest the Attorney General of any interest in the fund, by virtue of the fact that plaintiff's right to

impress a constructive trust matured into possession long after the December 31, 1961 cutoff date set forth in §41.

There hias bien so

Duces Mil

Sworn to before me this 29th day of May, 1975.

Gestrice M. Karles

BEATRICE M. KARLES
Notary Public, State of New York
No. 30-2036600
Qualified in Nessau County
Term Expires March 30, 19

* heren prejuested. We proceed by order to show Cause hereand as a hearing on or about lipine HITO we proceed not that manner.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION Background

This is an action commenced by plaintiff to impress a constructive trust upon property of the estate of the late Helen B. Dwyer. The claim is quasi in rem in nature and seeks an accounting by defendant, executor of the estate, with respect to plaintiff's interest in the estate. In the middle of March 1975 the Attorney General of the United States "appeared" in the action and filed a suggestion of interest on behalf of the United States pursuant to 28 U.S.C. §517. The instant motion is for an order formally joining the Attorney General or the United States as a party to the action pursuant to Rule 19(a), Fed R. Civ. P., and for summary judgment holding that any claim of the Government against Schmeider, based upon facts developed in this case, is barred by the provisions of 50 U.S.C. App. §41. The court is respectfully referred to the accompanying affidavit of James P. Duffy, III, for a complete statement of the facts relevant to plaintiff's motion.

POINT I

AN ORDER SHOULD BE ISSUED JOINING THE UNITED STATES OR THE ATTORNEY GENERAL AS A PARTY TO THE ACTION

Rule 19(a), Fed.R.Civ.P. provides in relevant part as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

Although the commencement of a civil suit by the United States, and perhaps, an appearance, do not waive the anachronistic defense of "sovereign immunity" to unconsented counterclaims*, we submit that when the United States appears, or is joined involuntarily as a party to a lawsuit,

^{*/} United States v. Shaw, 309 U.S. 495 (1940)

a judgment by the court on an issue involving a Government claim should serve as res judicata and not be subject to collateral attack. As set forth in the accompanying affidavit, the facts that would be developed at a trial in an action commenced by the United States against Schmieder if he prevails in this case, would be substantially similar if not identical to the facts that will be adduced in the case at bar.

The sovereign immunity concept would play little if no part in a decision by the court to join the Attorney General as a party, and subject matter jurisdiction would properly be founded upon 28 U.S.C. §§1331, 1361 or 50 U.S.C. App. §9. Remedies available would include review under the Administrative Procedure Act of the Attorney General's manifested admiristrative decision to sue Schmieder, injunctive relief, including mandamus, and declaratory relief under the Declaratory Judgment Act (28 U.S.C. §§2201, 2202).

We submit that the facts of this case show that a "just adjudication" of the controversies between the parties, including the Government, warrants the inclusion of the Government, as a party pursuant to Rule 19(a), Fed.R.Civ.P.

4.

POINT II

SUMMARY JUDGMENT SHOULD BE GRANTED TO THE EXTENT THAT ANY CLAIM BY THE GOVERN-MENT AGAINST SCHMIEDER IS BARRED BY THE PROVISIONS OF 50 U.S.C. APP. §41.

50 U.S.C. App. §41 provides in relevant part:

(a) Subject to the provisions of subsection (b) hereof [of this section], all rights and interests of individuals in estates, trusts, insurance policies, annuities, remainders, pensions, workmen's compensation and veterans' benefits vested under this Act [sections 1-6, 7-39 and 41-44 of this Appendix] after December 17, 1941, which have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961, are divested:

It is clear from the accompanying affidavit, and the entire record before this court, that the Government now seeks to vest the proceeds of Schmieder's fraud action against Dwyer. This was never vested by the Government under Vesting Order No. 12528. In no event could the interest so vested accrue to Schmieder in possession prior to 1967 when Schmieder requested Dwyer to render an accounting, and the conscience of equity was aroused. At best, in 1948, this interest, if any, was an interest not vested in possession.

Even on the Government's assumption that Schmieder was vested in interest in the property that was seized, §41 would clearly require that the property be vested in possession

of the alien, and thus vested in possession of the Attorney General between 1941 and 1961, before equities of interests of any sort were lost permanently to the Government.

Matter of Brambeer, 63 Misc. 2d 263, 268 (Surrogate's Court, New York, 1970).

Conclusion

An order should be issued joining the United States or the Attorney General as a party to the action; summary judgment should be granted to the extent that any claim by the Government against Schmieder is barred by the provisions of 50 U.S.C. App. §41.

Respectfully submitted,

WERNER GALLESKI, ESQ. Attorney for Plaintiff 450 Park Avenue New York, New York 10022

BERG AND DUFFY 3000 Marcus Avenue Lake Success, New York 11040

James P. Duffy, III, Esq. Thomas A. Illmensee, Esq. Of Counsel

842a

NOTICE OF CROSS MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

69 Civ. 1939 (WK)

Plaintiff,

- against -

LOUIS H. HALL, JR., as preliminary executor of the Estate of HELEN B. DWYER,

NOTICE OF CROSS-MOTION

Defendant.

Martin, Jr., sworn to the 10th day of June, 1975, and all pleadings and prior proceedings herein, the defendant Louis H. Hall, Jr. shall cross-move in the alternative before the Honorable Whitman Knapp, United States District Judge, Southern District of New York, United States Courthouse, Foley Square, New York, New York, Courtroom No. 10, on the 13th day of June, 1975 at 2:00 p.m. on said date, for an order pursuant to Rules 12 and 19 (a) of the Federal Rules of Civil Procedure dismissing the complaint herein for the failure of plaintiff to join the United States or the Attorney General of the United States as an indispensable party hereto.

Dated: New York, New York June 10, 1975

Yours, etc.

TURCHIN & TOPPER 60 East 42nd Street New York, New York 10017

MARTIN, OBERMAIER & MORVILLO 1290 Avenue of the Americas New York, New York 10019 Attorneys for Defendant

By 56. 5 2/100 56

,

TO: Berg and Duffy
3000 Marcus Avenue
Lake Success, New York 11040

Werner Galleski, Esq. 450 Park Avenue New York, New York 10022

Frederick P. Schaffer, Esq. Office of the U.S. Attorney One St. Andrew's Plaza New York, New York 10007 AFFIDAVIT OF JOHN S. MARTIN JR. IN OPPOSITION TO MOTION AND IN SUPPORT OF CROSS MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

844a

KURT SCHMIEDER,

69 Civ. 1939 (WK)

Plaintiff,

- against -

LOUIS H. HALL, JR., as preliminary executor of the Estate of HELEN B. DWYER,

AFFIDAVIT

Defendant.

-----x

STATE OF NEW YORK)

; SS.:

COUNTY OF NEW YORK)

JOHN S. MARTIN, JR., being duly sworn, deposes and says:

- 1. I have been retained by Louis H. Hall, Jr., the Executor of the Estate of Helen B. Dwyer, to serve as counsel for the defendant in this action, together with the firm of Turchin & Topper. I make this affidavit in opposition to plaintiff Schmieder's motion to join the Attorney General of the United States as a party to this action.
- 2. Plaintiff now asserts that the Attorney General is a necessary party who must be joined pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. It should be noted that subdivision (c) of that Rule requires that "a pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons" who are necessary parties pursuant to subdivision

- (a). Plaintiff has never filed a pleading naming the Attorney General as a necessary party.
- 3. In any event, the Attorney General is not a necessary party since complete relief between plaintiff and defendant can be accorded without his participation as a party in this action. Moreover, the position of the Attorney General as a party at this late date may seriously delay the disposition of this matter. For example, to date, some twenty days before the scheduled trial of this action, the plaintiff has not filed a complaint against the Attorney General. Thus, even if a complaint were served today, the Government's time to answer would not expire until the date now set for trial. In addition, plaintiff has initiated an attempt to obtain discovery from the United States and it can be expected that if the Attorney General is joined as a party, these attempts to obtain discovery will continue and will delay the start of the trial. Since the prompt resolution of this action is important to enable the Executor to complete the administration of the Estate, defendant strongly opposes plaintiff's effort to make the Attorney General party to this action because to do so will inevitably cause delay.
- 4. If the Court disagrees with our position and determines that the Government is an indispensable party, then pursuant to Rule 12, the complaint should be dismissed since the complaint now on file with the Court is deficient because it fails to name

an indispensable party. While the Court may, of course, grant leave for the plaintiff to file a new complaint, such action should be required so that there is before the Court a complaint which articulates the respective claims of the plaintiff as to the present defendant and the Attorney General.

WHEREFORE, deponent prays that the motion of plaintiff for an order joining the United States as a party to this action should be denied or in the alternative, that an order should entered pursuant to Rule 12 dismissing the complaint herein.

John S. MARTIN, JR.

Sworn to before me this

10th day of June, 1975

MARGARET C. HISLOP Notary Futilic, State of New York No. 03-6914500

Qualified in Bronx County Commission Expires March 30, 1972

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER.

Plaintiff,

-against-

69 Civ. 1939 (WK)

LOUIS H. HALL, JR., as preliminary Executor of the Estate of HELEN B. DWYER. Defendant.

> MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO JOIN THE UNITED STATES OR THE ATTORNEY GENERAL AS AN INDISPENSABLE PARTY AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Preliminary Statement

On May 30, 1975, over six years after commencing this action and one month before the date set for trial, plaintiff decided that the Government is an indispensable party and moved by order to show cause to join the United States or the Attorney General under F.R. Civ. P. 19. In addition, although neither of the proposed indispensable parties have yet had the opportunity to file a claim against plaintiff, and plaintiff has submitted no proposed pleadings against the Government, plaintiff has moved for summary judgment in his favor in order to bar the claim which he thinks the United States will bring against him if he prevails in the instant case. The Government submits this Memorandum of Law in opposition to these motions.

BACKGROUND FACTS

As a result of a discussion and subsequent correspondence between James P. Duffy, III and Assistant Attorney General Irving Jaffe in May, 1974, the United States learned of the pendency of this action and was informed that the Court wished an expression from the Government of its interest in the outcome of this action. Mr. Jaffe communicated the views of the Department of Justice to the Court in a letter dated June 28, 1974. Thereafter, on March 11, 1975, the United States appeared pursuant to 28 U.S.C. §517 and filed a Suggestion of Interest in order to make its views formally on the record. The thrust of said Suggestion of Interest was that the proper application of the Trading With the Enemy Act and of the principles of equity required that defendant should prevail in this action. However, the Affidavit of Assistant Attorney General Jaffe specifically reserved to the United States, the right to protect the integrity of the administration of the Trading With the Enemy Act by proceeding in a separate action against plain; if he should recover any part of the property in issue in this suit.

There are several reasons why the United States chose merely to appear and file a Suggestion of Interest rather than to intervene as a party in this action. First, the Government's primary interest in this suit is not monetary but rather to uphold the policies embodied in the Trading With the Enemy Act, which in the Government's view require that plaintiff be held to have lost all interest in the property in question as a result of the Vesting Order. Second, the claims of the United States against plaintiff are contingent upon plaintiff's success in this suit, and such "unmatured" counterclaims may not be asserted under the Federal Rules of Civil Procedure. See Stahl v. Ohio River Co., 424 F.2d 52 (3d Cir. 1970), Marcus v. Marcoux, 41 F.R.D. 332 (D.R.I. 1967); Scherza v. Home Indemnity Co., 257 F.Supp. 97 (D.R.I. 1966); Bach v. Quigan, 5 F.R.D. 34 (E.D.N.Y. 1945).

Third, even if such a contingent counterclaim could be asserted by the United States, the factual allegations and legal reasoning underlying it would not be completely clear until plaintiff's suit against defendant was resolved. For example, the nature of the Government's claim, and indeed the identity of the party against whom it is asserted, may depend on whether the Court finds that there was fraud in the procurement of Mr. Schmieder's "Affirmation in Lieu of Oath" in 1948. If the Court so finds, the Government

may have grounds for setting aside its settlement with Mrs.

Dwyer and therefore for proceeding against her estate instead of or in addition to Mr. Schmieder. Thus, until the present action has been decided, the Government is not in a position to frame its pleadings properly much less to plan and conduct discovery.

Finally, the Government was and continues to be concerned that its entry as a party to this action would serve to delay the resolution of an already ancient litigation and would unnecessarily complicate a case whose description already sounds like the product of a Dickensean imagination. This concern appears fully justified by the fact that even though the Covernment is not a party, it was served by plaintiff with a "cross-claim" and a set of interrogatories and a request for the production of documents that raise a variety of new and, in the Government's view, irrelevant factual questions. The Government's decision not to intervene was based in significant part on the desire not to provide a pretext for such delaying tactics.

The above-mentioned policy considerations are presented as background to the Government's decision not to intervene as a party to this litigation. Plaintiff's present motion to join the Government obviously raises legal issues of a somewhat different order to which the remainder of this Memorandum will be devoted.

ARGUMENT

POINT I

NEITHER THE UNITED STATES NOR THE ATTORNEY GENERAL IS AN INDISPENSABLE PARTY TO THIS ACTION.

In moving for an order joining the United States or the Attorney General as a party to this action, plaintiff seeks to have resolved at this time, all claims relating to the property in question and to avoid the necessity of further litigation concerning this matter. The Government is mindful of the public interest in judicial economy and recognizes that pare of the purpose of F.R. Civ. P. 19 is to further that interest. See Advisory Committee Note to 1966 Amendment to Rule 19, 39 F.R.D. 89, 91 However, by its terms, Rule 19(a)(1) calls for joinder of a party if "in his absence complete relief cannot be accorded among those already parties." (emphasis added) Plaintiff's suit is not to quiet title, but rather one to impress a constructive trust upon certain property in the estate of Helen B. Dwyer and to have an accounting and payment to him of the funds therein. He seeks, in other words, a judgment as to his rights to said property vis-a-vis the estate. There is nothing in the absence of the United States as a party which prevents plaintiff from obtaining complete relief as against defendant. Moreover, this is not a situation where the Government has an independent and definite claim to the property in question which will necessarily be asserted at some future time. As already noted, the claim of the United States is contingent upon plaintiff prevailing in his action and the nature of that claim may depend on the Court's findings of facts herein. In circumstances

such as this one where the absent party's claim has not yet matured, the joinder of that party is not required by Rule 19(a)(1).

Plaintiff also argues that the United States or the Attorney General is an indispensable party under the criteria set forth in Rule 19(a)(2). Plaintiff contends that the disposition of the action in their absence may impair the Government's ability to protect its interest, because it will not be a party to the accounting. Plaintiff further claims that because of the possibility of a later suit against him by the Government, he will be subject to multiple liability. Both of these arguments are without merit. While the Government appreciates plaintiff's solicitude for its interests, the United States is confident of its ability to protect them without its joinder as a party. Where the United States denies that its joinder is necessary, plaintiff hardly has standing to assert the Government's interests as a reason for joining it. Furthermore, although plaintiff may be sued by the Government if he prevails in this action, that fact alone does not create a "substantial risk" that plaintiff will incur "double, multiple, or otherwise inconsistent obligations by reason of Government's] claimed interest." F.R. Civ. P. 19(a)(2)(11). On the contrary, a suit by the Covernment against plaintiff would be for the purpose of determining the respective rights of plaintiff and the Government to the funds upon which this Court had impressed a constructive trust. It is difficult to imagine how such a suit could subject plaintiff to inconsistent obligations.

General were indispensable parties to this action, plaintiff should not be heard to complain, because the responsibility for their absence rests entirely with him. Plaintiff had six years to amend his complaint to join the United States as a party if he had chosen to do so. As will be demonstrated below, a claim against the Government would in any event be barred by sovereign immunity. However, compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a law suit, see Wright & Miller, Federal Practice and Procedure: Civil \$1602(1972), and where plaintiff has failed to exercise that right, he should not be permitted to seek the benefit of the provisions of Rule 19.

POINT II

THE JOINDER OF THE UNTID STATES OR THE ATTORNE. GENERAL IS NOT FEASIBLE BECAUSE OF THE DOCTRINE OF SOVEREIGN INSUNITY.

Plaintiff's purpose in seeking to join the United States or the Attorney General as a party seems to be to obtain a judgment that any interest in the property in question which he obtains as a result of the main action is free of any claim by the Government.* While plaintiff may find the doctrine of sovereign immunity "anachronistic," (see Memorandum of Law, p. 2), it is nevertheless still good law that a claim against the United States cannot be maintained without its consent.

Flaintiff's suggestion that the bar of sovereign immunity can be avoided by joining the Attorney General rather than the United States is frivolous. The general rule is that relief sought nominally against an officer is in fact against the sovereign if it would operate against the latter. See State of Hawaii v. Gordon, 373 U.S. 57 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949). Plaintiff's claim against the Attorney General is quite clearly one against the sovereign. Not only would the Attorney General be acting within his official capacity if he were later to bring suit against plaintiff, but the interest which he would be asserting in the property in question is that of the United States. Thus, if the Attorney General alone were

plaintiff's claim against the Government is, since he does not include a proposed pleading along with his motion papers. Indeed, plaintiff never even specifies whether he thinks that the Government should be joined as a party-plaintiff or a party-defendant. However, in view of the relief he seems to be seeking against the Government and of the current absence of any claim by the Government against defendant, the United States or the attorney General must be considered as potential defendants for the purposes of plaintiff's motion. The defense of sovereign immunity would be equally in either case. See United States v. Shaw, 309 U.S. 405

party and in its absence, the case would have to be dismissed.

See Mine Safety Appliance Cov. Forrestal, 326 U.S. 371

(1945); American Guaranty Corp.v. Burton, 380 F.2d 789 (1st Cir. 1967); Ward v. Humble Oil Refining Co., 321 F.2d 775

(5th Cir. 1963); Trueman Fertilizer Co. v. Larson, 196 F.2d

910 (5th Cir. 1952).

States or the Attorney General is therefore barred by sovereign immunity unless the United States has consented to such suit. Although plaintiff makes no argument that there has been such consent, he points to three statutory grounds for relief against the Government which, if applicable, would constitute a waiver of sovereign immunity. Hone of them, however, provide plaintiff with a cause of action against the Government under the facts of this case.

basis for his claim against the Attorney General. However, plaintiff was an alien enemy during World War II and remains such with respect to the property vested in 1948. See Swiss Ins. Co. v. Miller, 267 U.S. 42, 45 (1925); Bank voor Handel en Scheepvaart, M.V. v. Kennedy, 288 F.2d 375 (D.C. Cir.), cert. denied, 366 U.S. 962 (1961). Furthermore, 50 U.S.C. App. 59 is not applicable to plaintiff's present claim, since the property in which he asserts an interest is not being held by the Attorney General (as successor to the Alien Property Custodian) or by the Treasurer of the United States.

Second, plaintiff cites 23 U.S.C. §1361 and mandamus as possible grounds for relief. Suits in the nature of mandamus to prevent a federal official from acting outside the scope of his authority are exceptions to the doctrine barring unconsented suits against the United States. See Beale v. Blount, 461 F.2d 1133, 137 (2d Cir. 1972); Toilet Goods Association v. Gardner, 360 F.2d 677 683 n.6 (2d Cir. 1966). However, plaintiff does and can not allege that a decision by the Attorney General to bring suit against plaintiff if he should prevail in this action is outside the scope of the Attorney General's powers. Such a claim would be preposterous, for while plaintiff may dispute the legal merits of any interest which the United States may assert as to the property in question, he has no basis for challenging the authority of the Government to assert it.

Third, plaintiff contends that he may seek judicial review under the Administrative Procedure Act "of the Attorney General's manifested administrative decision to sue Schmieder." Memorandum of Law, p. 3. The APA has been held to constitute a waiver of sovereign immunity to those claims which come within its scope. Kletschka v. Driver, 411 F.2d 436, 445 (2d Cir. 1969). However, the judicial review provisions of the APA are clearly inapplicable to any claim by plaintiff against the Covernment. To begin with, there has not yet occurred any agency action or decision which a court could review and which plaintiff can maintain caused him any

injury. See 5 U.S.C. \$\$702 and 704. The Government's Suggestion of Interest merely reserves the right of the United States to bring a suit against plaintiff if he should prevail in the instant action. Thus, plaintiff lacks standing under the "injury in fact" test, see Associated Data Processing Service v. Camp, 397 U.S. 150 (1970), and any challenge to the Government's decision to sue is premature. See Point III below. In addition, unless malicious or discriminatory, any future decision to sue plaintiff is surely unreviewable as an exercise of prosecutorial discretion. See Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973). In any event, plaintiff's suggested claim is not really for a review of a decision of the Attorney General. Rather, it is for a declaratory judgment as to the interest of the United States in the property which is the subject of this lawsuit, and the Declaratory Judgment Act does not constitute a waiver of sovereign immunity. Balistieri v. United States, 303 F.2d 617 (7th Cir. 1962); Anderson v. United States, 229 F.2d 675 (5th Cir. 1956), Brownell v. Ketcham, 211 F. 2d 121 (9th Cir. 1954); Zito v. Tesoriero, 239 F. Supp. 354 (E.D.N.Y. 1965).

Finally, plaintiff seems to suggest that the Government has waived its sovereign immunity when it appeared and filed its Suggestion of Interest, and that the Court may now adjudicate its alleged claim against plaintiff even if plaintiff's "counterclaim" against the Government is barred. This proposition is absurd. There is no authority for the contention that an appearance by the United States pursuant to 28 U.S.C. §517 constitutes a waiver of sovereign immunity.

The Government "appeared" in this action pursuant to a request by the Court to make known its views concerning a case in which the Government's interest in the integrity of the Trading with the Enemy Act was involved. The United States did not thereby intervene as a party nor did it file any "claim" against plaintiff. At the moment neither the Government nor any "clsim" by it is before this Court; if they were, there would be no need for plaintiff's compulsory joinder motion. Thus, unless plaintiff can assert an independent action of his own against the United States to which the United States has consented, there is no means by which the Government can be compelled to join this action. It may well be, as plaintiff seems to indicate, that his proposed claim against the United States is no more than an affirmative defense to the anticipated suit by the United States against plaintiff. But the United States has not yet commenced such a suit, and plaintiff's attempt to have the Court adjudicate this non-existent controversy must surely fail.

POINT III

THE JOINDER OF THE UNITED STATES OR THE ATTORNEY GENERAL IS NOT FEASIBLE BECAUSE OF LACK OF SUBJECT MATTER JURISDICTION

Even if plaintiff's attempt to join the United States or the Attorney General were not barred by sovereign

immunity, there would be no subject matter jurisdiction over a claim by plaintiff against the United States. As noted above, neither 50 U.S.C. App. §9, nor 28 U.S.C. §1361 (mandamus), nor the APA provide a basis for relief against the Government in this situation, and it is questionable in any case whether the APA may serve as an independent basis of federal jurisdiction. See Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973). The only other basis of jurisdiction alleged by plaintiff is 28 U.S.C. §1331. However, plaintiff fails to demonstrate that the value of the Dwyer estate is more than \$10,000 or that his proposed claim against the Government arises under federal law. Although plaintiff's claim against both defendant and the Covernment requires a determination of the effect of a vesting order under the Trading With The Enemy Act, the legal right which he asserts and the remedy he seeks -- to impress a constructive trust, with plaintiff as sole beneficiary, on property of which he was allegedly defrauded -- are derived from state law. Thus, there is no basis for federal jurisdiction over plaintiff's claim against the United States. See generally Wright, The Law of Federal Courts \$17 (24 ed. 1970).

FPS:bj 75-0805

claim against the Government is lacking not only because of the absence of a specific statutory grant, but also because there is presently no case or controversy between plaintiff and the Government. Plaintiff is seeking a judgment to forestall the possible assertion by the Government at some future date of an interest in property that has not yet been determined to belong to plaintiff. It is difficult to imagine a situation less ripe for judicial review. See Boyle v. Landry, 401 U.S. 77 (1971); Poe v. Ullman, 367 U.S. 497 (1961); International Longshoremen's Local 37 v. Boyd, 347 U.S. 222 (1954).

POINT IV

ANY POTENTIAL PREJUDICE TO THE PARTIES AS A RESULT OF THE GOVERNMENT'S ABSENCE MAY BE AVOIDED BY PROTECTIVE PROVISIONS IN THE JUDCHENT.

Rule 19(b) provides as follows:

"If a person as described in subdivision (2) (1)-(2) hereof cannot be made a party, the court shall
determine whether in equity and good
conscience the action should
proceed among the parties before it,
or should be dismissed, the absent
person being thus regarded as
indispensable. The factors to
be considered by the court include:
first, to what extent a judgment
rendered in the person's absence

might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate: fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Thus, if the Court should agree with plaintiff that the Government should be joined under the provisions of Rule 19(a), but agrees with the Government that such joinder is not feasible because of sovereign immunity and lack of subject matter jurisdiction, the Court must determine if and how the action should proceed. The Government submits that in that circumstance dismissal would not be warranted for two reasons. First, plaintiff would have no adequate remedy if the action is dismissed for nonjoinder, since there is no way for plaintiff to cure his nonjoinder of the Government; the bar of sovereign immunity and lack of subject matter jurisdiction would apply to any action which he attempted to bring against the Government, and the Government has no basis for bringing its suit until plaintiff prevails against defendant.

Second, any prejudice to the existing parties can be avoided by the proper shaping of the relief in this action. In Hudson v. Newell, 172 F.2d 848, 'mpdified on othergrounds, 1/4 F.2d 546 (5th Cir. 1949), plaintiff sought a declaration of title to land and oil contained therein, but had not and could not join all adverse claiments whose rights might be affected. The Court concluded that it could not grant complete relief but retained the action in order to determine the rights in the land among the parties who were before it. In a similar way, the Court should proceed with this action and if it holds in favor of plaintiff, its judgment should include a protective provision that the trust impressed upon the property of the Dwyer estate is subject to any claims against it by the Government based on the Government's demonstration of a superior right to the proceeds of said trust to that of plaintiff.

POINT V

PL'INTIFF'S MOTION FOR SUMMARY JUL MENT IS PREMATURE.

It is not clear whether plaintiff's motion for summary judgment is directed toward the claim he thinks he has against the Government or the claim which plaintiff anticipates the Government will bring against him. In either case, it is premature, for no such claims have been

filed. The arguments contained in plaintiff's papers are founded on his assumptions as to the basis for the contingent and hypothetical claim of the United States to the property in question. Not surprisingly, plaintiff has therefore mischaracterized the possible legal bases for some future claim by the Government and has misinterpreted and misapplied the provisions of 50 U.S.C. App. 541. Until the United States commences an action against plaintiff or is joined as a party to this suit and supplemental pleadings are filed concerning the interest of the United States to the property in question, there is no claim before the Court upon which summary judgment can be granted. Thus the Government will reserve for the appropriate time, its rebuttal to plaintiff's contention that any claim by the Government is barred by the provisions of 50 U.S.C. App. 541.

CONCLUSION

For the foregoing reasons, plaintiff's motions for compulsory joinder of the United States or the Attorney General and for summary judgment should be denied, and this case should proceed to trial without further delay.

Dated: New York, New York

June 11, 1975

Respectfully submitted,

PAUL J. CURRAN United States Attorney for the Southern District of New York

FREDERICK P. SCHAFFER
Assistant United States Attorney

-Of Counsel-

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

PLaintiff,

AFFIDAVIT OF JAMES P. DUFFY, III IN REPLY

-against

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

69 Civ. 1939 (WK)

Defendant.

STATE OF NEW YORK)

(ss.:
COUNTY OF NASSAU)

JAMES P. DUFFY, III, being duly sworn, says that:

I am one of the attorneys for plaintiff, and I
make this affidavit to clear up certain factual matters that

are incorrectly stated in the Government's papers.

In both Deputy Assistant Attorney General Jaffe's affidavit filed in connection with the Government's suggestion of interest and the Government's memorandum submitted in opposition to our current order to show cause, the Government makes the statement that the first time it became aware of these proceedings was when I met with Deputy Assistant Attorney General Jaffe at his office in Washington, D. C., on or about May 1974.

As the prior record of this proceeding will clearly show, that meeting occurred on May 14, 1973, and not a year later, as the Government suggests. In addition, one of defendant's former attorneys, Richard Owen, had advised me that he had sent the Government copies of all then current pleadings in this action sometime in late 1970 or in early 1971. These papers were in the Government's file at the time of my meeting with Mr. Jaffe, and one of Mr. Jaffe's assistants, whose name I recall to be John R. Franklin (who was also present at the meeting), was most certainly aware of them and had been aware of them for some considerable period of time.

Contrary to the impression that the Government creates, it has been aware of this litigation since at least 1971 and has had copies of significant pleadings since that time. The problems, if any, that exist in connection with the clarification of the Government's status do not grow, therefore, out of plaintiff's efforts to clarify that status, but rather, they grow out of the Government's inaction and failure to take those steps that it now apparently deems necessary to protect its alleged interests.*

^{*}In this regard, the Court should note that, in November 1974, Mr. Jaffe wrote that the Government would shouly intervene in this action, but it did nothing until March 1975.

Even if Mr. Jaffe is not mistaken about his first knowledge of this action, it still took the Government approximately ten months from March 1974 to assert an interest. In actual fact, my meeting with Mr. Jaffe occurred twelve months prior to his recollection of it; accordingly, it took the Department of Justice some twenty-two months to conclude that the Government had an interest and take steps to protect that interest. An examination of the Government's files will clearly show, however, that the Government had knowledge of this action for approximately five years and did nothing to protect its alleged interests.

It was not incumbent upon plaintiff to solicit the Government's entry into this case; rather, it has been plaintiff's position throughout that the Government has no interest. This was defendant's position, and, despite Mr. Owen's efforts to involve the Government as noted above, the Government declined, until recently, to act to protect its alleged interest. The defendant never took definitive steps to resolve this issue. Neither the Government nor defendant should be heard to complain, therefore, about the consequences that flow from this inaction.

If the Government felt that it had such a pressing interest in the outcome of this matter, it had ample opportunity and authority to assert its interests well in advance

of the trial. Now that the Government has, on the eve of trial, determined that it has a substantial interest in the outcome of this matter and the right to obtain any benefits that might flow to plaintiff should he succeed in this action, it should not be heard to complain that the proper clarification of its status and the resolution of its interest will delay the trial of this matter. Plaintiff seeks no delay and is, in fact, 88 years old and very much desirous of seeing this matter resolved during his lifetime so that he may enjoy some of the benefits for which he has fought so long and hard.*

The Government's insistance that its claim is a "contingent" claim cannot be supported in fact or in law.

Whether or not plaintiff recovers will in no way change the existence or non-existence of the facts upon which the Government must necessarily rely in order to succeed. If the Government's contention is that it is unable to prove those facts, that does not make its claim contingent; it merely makes its case weak. If the Government is unwilling to seek to prove those facts, it should be barred on equitable principles from delaying further with the prosecution of its claim.

^{*}The Government has already informed plaintiff's attorneys that it will appeal any adverse decisions. The interests of justice require that plaintiff know exactly when and what it is that the Government intends to appeal rather than wait until defendant has exhausted its remedies before the Government takes over.

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In any event, if the Government is now saying that it is incapable of proving a claim, then plaintiff must prevail in his contention that the Government has no claim against him. If the Government feels it has a provable claim, then justice requires that the Government assert it in this proceeding as part of its appearance in this action and the filing of its suggestion of interest.

Sworn to before me this 18th day of June, 1975.

Seatrice Th. Karles

BEATRICE M. KARLES
Notary Public, State of New York
No. 30-2036600
Oualified in Names County
Term Expires March 30, 1977

PLAINTIFF'S REPLY MEMORANDUM

Argument

PLAINTIFF'S MOTION SHOULD BE GRANTED IN ITS ENTIRETY

The Government, in its opposition papers, maintains that plaintiff has "delayed" for six years the joinder, or attempted joinder, of the United States or the Attorney General as a party to the action, and further, that plaintiff seeks to delay the trial of this action. These contentions are incorrect, since it was the United States, by appearing in the action and filing a suggestion of interest in March 1975 (several years after it was aware of the pendency of the case), that precipitated plaintiff's motion. Schmieder stands read; to proceed to trial on the scheduled trial dated, June 30, 1975, are has issued subpoenas for that purpose.

The Government's position, in electing to "appear" but not be a "party", boils down to one premise: it desires to wait and see what facts are developed at the trial. Apparently, there is now a possibility that the United States may sue defendant Hall, and endeavor to set aside its settlement with Helen B. Dwyer, as well as suing Schmieder if he prevails in the action. Therefore, the necessity of a Rule 19 order of joinder is even more apparent. The Government's characterization of its possible claims as "contingent" is inaccurate. All the operative facts of the case exist now, and will not change simply because a trial will commenc on June 30th.

The Government's proposed defense of sovereign immunity, with respect to a suit not seeking money damages, against. the United States, or an officer thereof, including the Attorney General, no longer has vitality and the holdings of the cases cited in the opposition papers have been eroded by a plethora of decisions permitting suits against the Government. See K. Davis, Administrative Law Treatise (1970 Supp.) §§27.00-27.10. Further, plaintiff does not contend that the Declaratory Judgment Act serves as a waiver of sovereign immunity, but its use as a remedy against the Government, as well as any other party is well established. See 6A Moore's Federal Practice ¶¶57.11-57.21. While the Government states that there are no precedents holding that an appearance pursuant to 28 U.S.C. §517 waives sovereign immunity, it fails to cite any cases which indicate that an appearance under the section does not constitute such a waiver. It is interesting to note that in most of the recent reported decisions contruing §517, the Government was a party to the action.

The Government's contention that the court would lack subject matter jurisdiction over the United States is clearly incorrect. Subject matter jurisdiction in an action against the Attorney General or the United States could be founded upon a federal question, diversity or mandamus basis (28 U.S.C. §\$1331, 1332, 1361). Venue could be properly laid in the Southern District of New York pursuant to the provisions of 28 U.S.C. §1391.

Plaintiff seeks nothing more than a declaration by this court that the Government has no valid claim against Schmieder, under the framework of the Trading with the Enemy Act, or under any other theory of liability. In order to properly adjudicate the issue of Schmieder's proposed liability (as articulated in the suggestion of interest filed with the court), it is necessary that the United States or the Attorney General be a party and have an opportunity to offer evidence and cross-examine. At the court's direction, plaintiff would file a supplemental complaint requesting a declaratory judgment concerning Schmieder's alleged liability to the United States. In the alternative, the affidavit accompanying the suggestion of interest could be treated by the court as a pleading stating the Government's "contingent" claim. We believe the latter alternative is preferable, since the Government is permitted 60 days to answer a supplemental complaint (Rule 12(a), Fed R. Civ P.), which in turn, would delay the trial scheduled for June 30, 1975. A formal "response" to the suggestion of interest has already been filed by plaintiff.

Conclusion

Plaintiff's motion should be granted in its entirety.

WERNER GALLESKI, ESQ. Attorney for Plaintiff 450 Park Avenue New York, New York 10022

BERG AND DUFFY 3000 Marcus Avenue Lake Success, New York 11040

James P. Duffy, III Thomas A. Illmensee of Counsel ENDORSED ORDER OF KNAPP, D.J. ENTERED JUNE 23, 1975 ON MOTION DATED JUNE 3, 1975 DENYING MOTION TO JOIN GOVERNMENT AND FOR SUMMARY JUDGMENT

Motion to join the Government as indispensable party is denied. Motion for summary judgment against the Government is denied.

Copy of order unobtainable, but entered June 23, 1975 pursuant to Docket Sheets.

ENDORSED ORDER OF KNAPP, D.J. ENTERED JUNE 23, 1975 ON MOTION DATED JUNE 12, 1975 DENYING MOTION TO DISMISS

Motion to dismiss complaint for failure to join an indispensable party is denied.

Copy of order unobtainable but entered June 23, 1975 pursuant to Docket Sheet.

KNAPP, D.J.

This six year old diversity action was tried without a jury on June 30 and July 1 of this year. Plaintiff Kurt Schmieder, a citizen of the Federal Republic of Germany, seeks to impress a constructive trust upon certain property of the estate of the late Helen B. Dwyer. The defendant Louis Hall, Jr., an attorney, is the executor and a principal beneficiary of the Dwyer estate.

In essence, the plaintiff claims that there was a gentlemen's agreement to return to him at some future time certain property which was transferred unconditionally and absolutely to Mrs. Dwyer in 1938.

Plaintiff alleges that he was defrauded by Mrs. Twyer who, he maintains, was acting on behalf of Louis Hall, Sr., the father of the present defendant, and the attorney who drafted all of the relevant documents relating to the transfer of the property.

The defendant, who is being sued in his capacity as executor of the Dwyer estate, vigorously denies the plaintiff's allegations. He contends that there were no such gentlemen's agreement, and that the gift to Mrs. Dwyer was, in fact, unconditional and absolute. Furthermore, the defendant claims that any interest that plaintiff may have had in the property was cut off in 1948 when his property was vested by the Alien Property Custodian pursuant to the Trading with the Enemy Act, 50 U.S.C. App. §1 et seq.

After carefully considering all the testimony, depositions and documents submitted in this case, we find for the defendant on both the above grounds, and, accordingly, dismiss the plaintiff's complaint.

I. Background

The crucial events in this Lather unique litigation occurred almost forty years ago, in 1938, when Helen Dwyer became the recipient of an "irrevocable and unconditional" gift of property, the beneficial owner of which had been plaintiff Kurt Schmieder.

Moreover, in order to fully understand these events it is necessary to discuss occurrences which date back as far as World War I. Not surprisingly, with the exception of Schmieder, the principal protagonists in this dispute - Louis Hall, Sr., William Graupner, and 1/

Helen Dwyer - are all deceased.

During World War I, property owned by Schmieder's father was seized by the United States Government pursuant to the Trading with the Enemy Act. 50 U.S.C. App. §1 et seq. In 1928, as his father sole heir, Schmieder received the return of an amount equal to eighty percent of the value of the property seized. Shortly thereafter, Schmieder devised a scheme to evade legitimate German property taxes on the money thus returned to him. The evidence indicates that he divided the returned property into two funds. The larger fund was no reported to the German taxing authorities, while the smaller fund was

In the early 1930s, this unreported account was transferred into the name of Schmieder's sister-in-law, Jenny Bochmann, a resident of Switzerland.

Thus, the situation stood in 1934 when the Naxis came into power. The relevance to this lawsuit of that his orical event is that the Nazi regime enacted increasingly severe penalties culminating in the possible sentence of death - for those who concealed This factor led Mrs. Bochmann (who had a son living property abroad. in Germany) and Schmieder to take a series of steps in order to disassociate themselves from the unreported funds. In 1935, Schmieder met Louis Hall, Sr., who was then vacationing in Germany. The meeting took place at the house of a mutual acquaintance. William Graupner. There, Schmieder asked Hall certain general questions concerning the formation of a corporation to hold securities in the United States, and the tax consequences of establishing such a corporation. was a senior partner in the New York law firm of Putney, Two Ly & Hall, the firm that had previously represented the corporation owned by plaintiff's father which had been the original source of plaintiff's American wealth.

In the fall of 1936, Graupner returned to the United States and told Hall, Sr. that his law firm should draw up the necessary paper to establish a personal holding corporation for a woman named Jenny

Bochmann. Acting pursuant to these directions, Hall Sr. supervised the formation of Stoneleigh Corporation. All the shares of Stoneleigh were issued to Mrs. Bochmann in consideration for the transfer to the corporation of the assets in Mrs. Bochmann's name which had been in an account at the New York Trust Company. Herman Graupner, William. Graupner's son, was named president of Stoneleigh. Louis Hall, Jr., then an associate in his father's firm, helped draft the papers creating Stoneleigh.

In April, 1937 William Graupner received a letter from Jenny Bochmann stating that she no longer wanted her name used for Stoneleigh and that she wanted to sever all connections with the 7/ corporation. Graupner discussed the matter with Hall, Sr., who indicated that there was no way that the property could be held in the United States with the names of the true owners concealed. Hall advised that since Mrs. Bochmann wished to divest herself of all interest in the property, and since Schmieder himself could not take 8/ the property back to Germany, the only solution would be to give 9/

William Graupner returned to Germany in the summer of 1937 and told Schmieder what Hall had said. Schmieder was hesitant at first but by the fall of 1937, he decided to take Hall's advice. He notified Graupner of his decision, explaining that since they had last spoken he had been called in by the German authorities to make

880a

a report concerning his foreign holdings. According to Graupner, it was expressly stated to Schmieder that the gift must be absolute, 11/
with "no strings attached." Schmieder supposedly agreed, and told Graupner that he and Hall should take care of all the necessary arrangements, including the choice of a donee. At the time of this discussion, Schmieder gave Graupner a slip of paper upon which he wrote in German: "I am in agreement with the arrangement which we have 12/
discussed for my sister-in-law."

Upon Grupner's return from Europe, he and Hall began to take the necessary steps to dispose of the Stoneleigh Corporation assets. After discussing the possibility of making either of their respective sons the recipient of the gift, they decided that the property should be given to Helen Dwyer, then Hall Sr.'s personal secretary. The necessary papers were drafted by the eider hall, finally forwarded to Switzerland, and/signed and returned by Mrs. Bochmann.

Among the papers pursuant to which the gift was made was a letter dated March 15, 1938, from Mrs. Bochmann to Mrs. Dwyer which stated:

"I am the owner of the outstanding stock of Stoneleigh Corporation . . . I wish to make an absolute gift to you of both my stock in the said corporation and of my claims for advances against it " 13/

The value of the Stoneleigh stock at the time was approximately \$120,000.

Helen Dwyer had been the elder Hall's secretary single

1929. Born in 1895, she was orphaned at the age of three and from

1898 to 1914 lived with her aunt and uncle. During the First World

War, she married a man who was in the Navy. Tragically, however,

early in the 1920s her husband was committed to a mental institution,

run by the Veternas Administration, where he remained until his death.

Hall, Sr. maintained that it was Mrs. Dwyer's unfortunate past that

had prompted the decision to make her the beneficiary of the Stone
14/

leigh assets.

Despite her new wealth, Mrs. Dwyer's lifestyle did not undergo any radical shift. Although she moved from Brooklyn to a larger more expensive apartment on Central Park South in Manhattan, she continued to work as Hall, Sr.'s personal secretary. She expended from the assets of the property approximately \$2,000 per year for personal secretary. Shortly after the gift she had the first of a long series of wills drafted which left the bulk of her estate to various members of Hall, Sr.'s family.

In October, 1941, with war between the United States and Germany imminent, the United States Treasury issued regulations requiring the registration of all property held by United States citize for or on behalf of foreign nationals. After discussing the matter with Hall, Sr., Mrs. Dwyer contacted a lawyer, not involved with the

Stoneleigh transaction, in order to obtain his opinion as to what action she should take. The attorney, George Z. Medalie, Esq., advised her that it would be best to report to the government the facts surrounding the gift.

On October 31, 1941, Mrs. Dwyer reported the unconditional gift on Treasury Form TFR-300. Thereafter, on June 30, 1943, her actual containing the property she received from Stoneleigh were blocked by the government. From August 1, 1943 to October 18, 1948 Mrs. Dwyer filed nineteer applications for licenses to use some of the funds or for unblocking. She consistently maintained during this period that the gift from Bochmann was genuine and irrevocable, and that she was not holding the property on behalf of any person other than herself.

Vesting Order No. 12528, whereby he seized all of the property which Mrs. Dwyer had received from Stoneleigh on the ground that it was the 18/ property of Kurt Schmieder. Mrs. Dwyer, in turn, commenced an actic seeking the return of the property, claiming that it had been received by her as an absolute and unconditional gift. In 1951, a settlement was reached in the suit pursuant to which 55 percent of the seized property was returned to Mrs. Dwyer. A crucial piece of evidence which led to the settlement was a signed statement by Schmieder, obtained on June 1, 1945, which read:

"The undersigned confirms herewith that it is understood by him that the gift of Mrs. Bochmann's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dwyer is a voluntary, absolute and irrevocable gift, without any obligation of Mrs. Dwyer."

The statement was witnessed by a Dr. Alfred Lindner, who was apparently

19/

a mutual friend of Schmieder and William Graupner.

The plaintiff now contends that this absolute gift was subject to a gentlemen's agreement, whereby it was intended that the money transferred to Mrs. Dwyer would sometime in the future be return to him. He claims that the perpetrator of the fraud against him was Louis Hall, Sr., who acted as his attorney in the transaction, and whose family will now end up with the bulk of the Stoneleigh assets since Hall's children are the principal beneficiaries of the Dwyer estate. Schmieder charges that Mrs. Dwyer knew of this gentlemen's agreement, and acted as the agent for Hall, Sr. in the perpetration of the fraud.

I. Plaintiff's Standing to Sue

Before turning to the merits of the factual dispute, it is first necessary to determine whether, in light of the government's vesting order of 1948, plaintiff Schmieder still has any interest in the subject property. The defendant contends that the vesting order terminated every interest of plaintiff - legal or equitable, vested 20/contingent - in the property transferred to Dwyer. We agree.

or which is evidence of ownership or control by, Kurt Schmieder the aforesaid national of a designated enemy country (Germany);" (emphasis added)

The order concluded:

"THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."22/

Subsequent to the vesting of this property, Mrs. Dwyer brought suit for the return of the property to her on the ground that Schmieder did not have any interest in the property. As noted above, the lawsuit was settled pursuant to a stipulation which provide that Mrs. Dwyer would be given securities having a value of 55 percent of the total amount seized.

The statute, pursuant to which Schmieder's interest in the property held by Mrs. Dwyer was vested, provides that with respec to any seized property, the Alien Property Custodian

"shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof."

with the Enemy Act alien enemy owners are divested of every right beneficial as well as legal - in respect of money and property seized.

Cummings v. Deutsche Bank (1936) 300 U.S. 115, 120; Woodson v. Deutsche,
etc., Vormals (1934) 292 U.S. 442, 454. See, also, Balkan Nat. Ins. Co.
v. C.I.R. (2d Cir. 1939) 101 F.2d 75, 77; United States v. Borax Consol.
(N.D. Cal. 1945) 62 F.Supp. 220, 223.

It thus seems clear that if Schmieder had any interest in the property conveyed to Mrs. Dwyer, that interest was totally extinguished when the vesting order was issued. At that moment, the Alient Property Custodian had full and complete title to the property, and had the authority to deal with that property in any manner appropriate to the interests of the United States, including the settlement of a claim with a third party. Indeed, since the claim that the government settled when it reconveyed certain property back to Mrs. Dwyer was a claim that Schmieder retained some beneficial interest in the property, it seems apparent that the very interest Schmieder asserts

in this action is the one which was subject to the vesting order and ultimately disposed of in its settlement with Mrs. Dwyer.

Enemy Act have uniformly held that a divested alien has no right to pursue an action against a subsequent transferee from the United States for the return of vested property. In Mutzenbecher v. Ballard (S.D. N.Y. 1925) 16 F.2d 173, aff'd (2d Cir.) 16 F.2d 174, cert. denied 273 U.S. 766, plaintiff, a German co-partnership, sought to collect certain commissions earned by the defendant in the United States to which the plaintiff was in part entitled. Plaintiff's interest, however, had been seized by the Alien Property Custodian. The court held that upon seizure only the Alien Property Custodian could institute suit against the defendant for the commissions. It went on to state (16 F.2d at 17)

"Where the Alien Property Custodian has made a disposition of seized property of an enemy alien, including the adjustment of an alleged claim, such settlement cannot be attacked by the enemy alien, nor has the enemy alien any standing in a suit brought against the one with whom the Alien Property Custodian has settled."

Similarly, in <u>Munich</u> v. <u>First Reinsurance Co.</u> (2d Cir. 1925) 6 F.2d 7 appeal dismissed 273 U.S. 666, the Alien Property Custodian had seize stock in the defendant corporation which was owned by the plaintif: a German corporation. Thereafter, the Custodian sold the property, and out of those proceeds, paid the defendant, who had asserted a clagainst the plaintiff, a sum of about \$50,000. In affirming the

dismissal of plaintiff's complaint against the defendant for a return of that money, the Court of Appeals explained (6 F.2d at 747):

"The complainant, at the time the Custodian seized and sold its shares of stock in the defendant company, was, in our opinion, divested of all right, title, or interest in the property, and in the proceeds realized by the subsequent sale of the property. It could not thereafter reclaim the property from the person to whom it was sold. It had no right to or interest in the proceeds of the sale, and no right to reclaim any portion thereof which the Custodian paid over to a third person in settlement of a claim which such person had against the enemy."

In the face of such established legal precedent, the plaintiff sets forth three arguments in support of his position that he has standing to bring this action.

First, Schmieder argues that the vesting order related solely to specific items of property and was carefully drafted so as not to deprive him of any equitable claims against Mrs. Dwyer. Plaintiff, however, has suggested no motive as to why the Alien Property Custodian would wish to attach an alien enemy's legal interest in specified property and not his equitable interests as well. Such a disposition would clearly contravene the purposes of the Trading with 24/ the Enemy Act. and we are convinced that in this case such a result was clearly not intended.

Secondly, plaintiff claims that even if he had a beneficial interest in the property at the time of the vesting, this interest was regained when the government reconveyed certain of the properties back to Mrs. Dwyer. This argument, too, must be rejected. As noted above, once vesting occurs, the Alien Property custodian becomes the actual owner of the seized property. He has the right to sell the property, or to settle claims involving the property. When these events occur, however, the divested owner cannot regain any previously lost rights in the property. The whole scheme of the Act militates against such a result. 50 U.S.C. App. §7(e) provides that those who deliver money or property to the government pursuant to a vesting order are fully discharged of their obligations with respect to that property "for all purposes." Such transferors may not be held liable in any court for their compliance with a vesting order. Furthermore, as indicated above, subsequent transferees from the government cannot be sued by one whose property has been vested. Indeed, the Act explicitly states that the sole remedy available to an enemy alien is an action against. the government on the ground that the vesting order was improper. See, 50 U.S.C. App. §7(c) and §9.

Finally, the plaintiff argues that his claim for fraud did not arise until long after the vesting order was issued and the property returned to Mrs. Dwyer. He maintains that "the equitable duty to make restitution to Scholieder did not arise until the late 1960s when Schmied

learned for the first time that Dwyer, the Halls, and the Graupners 26/
had 'conspired' and acted to keep the property." This argument,
however, ignores the fact that whatever equitable interests Schmieder
had in the property arose on the very day in 1938 when it was transferred to Mrs. Dwyer. While his failure to discover the fraud until
the 1960s would affect the running of the statute of limitations,
it could in no way alter the fact that his interest on the property
pre-dated the vesting order. And, as noted above, whatever that
interest was, it was totally extinguished by the seizure of the propert
by the Alier Property Custodian.

II. Merits

Although we have found that the plaintiff does not have standing to pursue this action, we deem it appropriate, in the event that ruling should be overturned, to proceed to a decision on the merits.

As we have seen, the basic factual issues in this dispute concern the arrangements made when the Stoneleigh Corporation assets were given to Mrs. Dwyer. Schmieder claims that Hall, Sr. and Graupne had agreed that the property would be returned to him at some future time. He claims that Mrs. Dwyer knew of this gentlemen's agreement when she took the property, and that acting in concert with Hall, Sr. reneged on the promise.

At first blush, there appears to be substance to the Mrs. Dwyer never - to the day of her death plaintiff's charges. met Schmieder or Mrs. Bochmann. She was chosen as the done by her employer, Louis Hall, Sr., who, at the time, was acting as Schmieder's attorney in the disposal of the funds. Mrs. Dwyer had a personal and trusting relationship with Hall, and probably would have accepted the gift of property conditionally had Hall requested her to do so. Shortly after receiving the gift, she executed the first of a series of testamentary instruments all of which were drafted by or at the direction of Louis Hall, Sr., or Louis Hall, Jr., and all of which named members of the Hall family as primary beneficiaries. When, after the war, Schmieder tried to get in contact with Mrs. Dwyer, she acted in a singularly ungracious fashion, considering that Schmieder had been the ultimate source of her wealth and, whatever his motives, had rendered significant assistance in her efforts to get the property back from the government. Finally, no reasonable explanation for her conduct in this regard was even proffered.

and other
However, having considered all these/facts and circumstances, we conclude that singly or in combination they 's not established in 1938 Mrs. Dwyer and Louis Hall, Sr. embarked upc. and consummated a conspiracy to defraud Schmieder. In this connection we observe that while generally either a constructive trust or fraud must be proved by clear and convincing evidence, we do not feel that plaintiff we

have established his case even if normal civil standards of proof 30/ were to prevail.

Analyzing the evidence we start out with a realization that plaintiff Schmieder is a highly unsatisfactory witness. He knowingly and wilfully perpetrated a scheme in the early 1930s to a legitimate property taxes imposed by the German government in the day, of the Weimar Republic, a circumstance that can hardly be his explained - as plaintance attempt to - as hostility to the Nazis. Secondly, his present position in this lawsuit is directly antithetical to his sworn statement in 1948 that the gift to Mrs. Dwyer had been irrevocable and unconditional. This statement was a critical motivating factor in the government's decision to settle the Dwyer lawsuit, and we reject plaintiff's claim that he had no idea of the statement's purpose at the time it was made.

testimony, we must also observe that every other participant in the transaction at issue - Mrs. Dwyer, Hall, Sr., and William Graupner - has specifically repudiated and contradicted Schmieder's testimony.

Moreover, although Mrs. Dwyer and Hall, Sr. might be assumed to have 31/ had selfish motives that might have prompted false testimony. no one has suggested a reason why William Graupner would also commit perjury. All that is known about him is that he was a friend of both Schmieder and Hall, and that neither he nor his son either had or hoped

for any interest in the property given to Mrs. Dwyer.

Setting to one side considerations of veracity, and turning to the probabilities of the situation, they lean more in defendant's direction than in plaintiff's. Looking at the matter from Schmiecer's point of view, it must be remembered that in 1938. when the gift was made the Nazi regime was at its height and no one least of all a resident of Germany - would have been likely to anticipate that the regime would be lying in ruins in seven short years. Moreover, what Schnieder was seeking to avoid was the risk of being put to death upon discovery that he had been hiding foreign assets. In these circumstances, it seems more probable that he would have wished to get rid of all traces of ownership by an absolute gift rath than enter into some "gentlemen's agreement" which might conceivably have come to the attention of the Nazi authorities. Of course, many years later - with Nazi power only an unpleasantly remembered nightmare - Schmieder's r collections of his 1938 sentiments might have undergone a drastic change.

From Hall, Sr.'s and Mrs. Dwyer's point of view, it seen improbable that they would have undertaken the risks of playing fas and loose with their own government just to enable Schmieder (pract cally a stranger to Hall and a total stranger to Mrs. Dwyer) to out this.

with respect to Mrs. Dwyer's ultimate use of the money for the benefit of the Hall family, while it might generate suspicion, it cannot serve as a basis for a finding of fraud. It is clear that Mrs. Dwyer had a high regard for her employer and his family. There is no showing in the record that she had any close relationships with any members of her own family. She was aware of the fact that it was Mr. Hall who designated her as the recipient of the gift. It cannot therefore be thought unnatural that she should have decided to make the Hall family the recipient of her bounty upon her decease.

ungracious conduct at the time Schmieder tried to make contact with he and the defendant's total failure to offer any rational explanation for such conduct. This troubled the court during the trial, and still does. While it would be easy to postulate an explanation for the condit is difficult to imagine why none was offered. As to a possible explanation, Mrs. Dwyer had after all taken an oath in a federal court that there were no strings attached to the property in her hands and that she owed Schmieder absolutely no duty to account for the same. She might very well have feared that any conduct on her part inconsistent with such a position - such as even a meeting or a discussion with Schmieder - could have caused the government to reopen its case or might even have landed her in jail for perjury. But if such - or anything like it - were the cause of Mrs. Dwyer's conduct, Hall, Jr.

who was advising her in the matter, must have been aware of these considerations and could easily have testified concerning these motivations. Nevertheless, neither ungracious conduct on Mrs. Dwyer's part in 1967, nor lack of candor on Hall, Jr.'s part - if such there was, - in 1975, are sufficient (separately or taken together) to support a finding that Mrs. Dwyer and Hall, Sr. had in 1938 embarked upon and consummated a conspiraty to defraud.

CONCLUSIONS

In summary, we find that plaintiff has no standing to pursue this action, and, in the alternative, that plaintiff has failed to satisfy his burden of proof. Accordingly, the complaint must be dismissed.

The foregoing shall constitute the court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

SO ORDERED.

Dated: New York, New York

September 25, 1975.

Whitman KNAPP, U.S.D.

FOOTNOTES .

- Defendant has urged that plaintiff is precluded from testifying about conversations with Louis Hall, Sr. and William Graupner about conversations with Louis Hall, Sr. and William Graupner by virtue of New York State's Dead Man's Statute, Section 4519, by virtue of New York State's Dead Man's Statute, Section 4519, Civil Practice Law and Rules, McKinneys Consol. Laws of N.Y. Civil Practice Law and Rules, McKinneys Consol. Laws of N.Y. c. 7B. We find that provision inapplicable, and accordingly, we have considered all relevant testimony submitted at trial in reaching our conclusions.
- See Deferent's Exhibit 4. From 1925-1931, Germany had a property tax, and a resident of Germany was required to include property located outside Germany in his property tax return. property located outside Germany in his property tax return. Failure to disclose such property was a criminal offense. In 1931, the maximum sentence for this offense was increased from two years to ten years imprisonment. In addition, beginning in 1931, Germany enacted foreign exchange controls which required legal, Germany enacted foreign holdings. By 1932, the maximum citizens to report their foreign holdings. By 1932, the maximum penalty for failure to report was also ten years imprisonment.
 - Plaintiff's Exhibit 26A, p.41; Exhibit 27A, pp. 144-148.
 - 4/ Plaintiff's Exhibit 27A, pp. 12-16.
 - 5/ Defendant's Exhibit H.
 - 6/ Plaintiff's Exhibit 2A, p. 5.
 - 7/ Plaintiff's Exhibit 4C, pp. 15-19.
 - To the extent such a finding is at all relevant, we find that Hall, Sr. knew by this time that Schmieder was the beneficial or real owner of the assets of Stoneleigh Corporation.
 - Plaintiff's Exhibit 4C, pp. 19-24; 2A, pp. 7-8. with We are, of course, not concerned in this litigation/whether the legal advice rendered by Hall, Sr. was correct or not. It shows be noted, however, that plaintiff has not suggested any alternative course that could have been legally followed.

10/ Plaintiff's Exhibit 4C, p. 26.

11/ Plaintiff's Exhibit 4C, p. 27.

Plaintiff's Exhibit 4C, p. 39.

As is c vious, this statement is highly ambiguous and sheds no light whatsoever on the discussions between Graupner and Schmieder

13/ Defendant's Exhibit E.

14/ Plaintiff's Exhibit 2B, p. 3.

15/ Plaintiff's Exhibit 9A, p. 5.

Plaintiff's Exhibit 9A, pp. 5-6.

17/ Plaintiff's Exhibit 9A, p. 7.

18/ Plaintiff's Exhibits 12A, 12B.

19/
Defendant's Exhibit K-2.

Although this specific issue may have been decided in plaintiff': favor either directly or indirectly by other district judges to whom this case may have been previously assigned, we cannot now avoid the responsibility of considering the question de novo.

Dictograph Products Company v. Sonotone Corporation (2d Cir. 195 230 F.2d 131, 134-6, cert. dism. 352 U.S. 883 (Judge Learned Ham See, also, Rodriguez v. Olaf Pedersen's Rederi A/S (E.D.N.Y. 197 387 F.Supp. 754.

21/ Plaintiff's Exhibit 12-A. 22/

The original Vesting Order, Exhibit 12-A, was subsequently amended. but only to the extent of changing the description of the securitie vested. See Plaintiff's Exhibit 12-B.

23/
Plaintiff's Exhibit 13.

24/.

In <u>United States v. Chemical Foundation</u> (1926) 272 U.S. 1, 9-10, the Supreme Court stated:

"The purpose of the Trading with the Enemy Act was not only to weaken enemy countries by depriving their supporters of their property.
... but also to promote production in the United States of things useful for the effective prosecution of the war." (cite omitted)

The Court indicated that the Act should be "liberally construed to give effect to the purposes it was enacted to subserve."

See, also, Clark v. Uebersee Finanz-Korp. (1947) 332 U.S. 480.

Plaintiff relies heavily on <u>Craig</u> v. <u>Bohack</u> (2d Dept. 1963) 19 A.D.2d 891, 244 N.Y.S.2d 737. To the extent this case supports plaintiff's position, we feel it should be disregarded as an incorrect statement of federal law.

26/ Plaintiff's Post-Trial Brief at 27.

The government, when it vested the Dwyer properties in 1948, obviously thought that some agreement to return the property to Schmieder existed. Judge Holtzoff, who presided over the suit filed by Mrs. Dwyer to reclaim the vested property, in fact indicated during that proceeding that he felt Mrs. Dwyer had no litle in the property, and was simply a "straw". (Plaintiff's Trial and Evidence Memorandum at 10). Obviously, since the action in that case was settled by stipulation, and never formally tried by Judge Holtzoff, his remarks are not binding.

Sec. Lundy v. Murtagh (Sup. Ct. 1955) 141 N.Y.S.2d 247, appeal dismissed 143 N.Y.S 2d 820, and cases cited therein.

McDonnell v. American Leduc Petroleums (2d Cir. 1972) 456 F.2d 1170; Fein v. Starrett Television Corp. (1st Dept. 1952) 280 App. Div. 670, 116 N.Y.S.2d 571, aff'd 305 N.Y. 856.

30/

If Hall, Sr. had himself accepted the gift from his client Schmieder, the burden would have been upon him to establish the propriety of his conduct. See, In re Bartel's Will (4th Dept. 1970) 33 A.D.2d 987, 307 N.Y.S.2d 260; Howland v. Smith (3rd Dept. 1959) 9 A.D.2d 197, 193 N.Y.S.2d 140. However, that doctrine cannot be here invoked in the absence of proof that he was in a conspiracy with Mrs. Dwyer.

31/

Even so, it must be born in mind that Hall, Sr., a respected member of the New York Bar and a name partner in a leading law firm, cannot lightly be thought to have assumed the risks of committing perjury before a federal court in an action against the United States government. In this connection, we note that over plaintiff's strenuous objection we allowed two witnesses to give character testimony on behalf of Hall, Sr. This may well have been technical error. The testimony was allowed at a time when we felt we would probably find for plaintiff and were anxious to let the defendant build up the best record possible for purposes of appeal. However, if error it was, we can certify it was harmless beyond a reasonable doubt. We were well aware of the reputation of Hall, Sr. and his firm, and all the testimony accomplished was to confirm our then suspicion that Hall, Jr., was not being candid about his awareness of the events of 1938. That suspicion has since subsided in light of Schmieder's acute need for secrecy. At that time, Hall, Sr. may well have been proceeding on a "need to know" basis in making disclosures to his son.

32/

Mrs. Dwyer also loaned money to Hall, Jr. during her lifetime, but the same considerations would seem to apply to that transaction.

JUDGMENT ENTERED OCTOBER 6, 1975

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER

-agains t-

Plaintiff

69 Civil 1939 (WK)

OCT 6 1975

S D. OF N

JUDGMENT

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of HELEN B.

DWYER

Defendant

The issuesin the above entitled action having oeen brought on regularly for trial, before the Honorable hitman Knapp, United States District Judge, on June 30 and July 1, 1975, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on October 1, 1975, having handed down its opinion, constituting its findings of fact and conclusions of law in favor of the defendant, it is,

ORDERED, ADJUDGED and DECREED: That defendant LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer, have judgment against the plaintiff KURT SCHMIEDER dismissing the complaint.

Dated: New York, N.Y. October 6, 1975

Daymond & Buglardt

is/24/75- Bill of losts as tiget in the sun of \$838.23. in favor of the defendant, and added to the judgment, as # 75,841.

Raymond 7. Burghards

900a

NOTICE OF MOTION FOR ORDER AMENDING THE OPINION ENTERED SEPTEMBER 25, 1975 AND FOR AN ORDER GRANTING PLAINTIFF A NEW TRIAL, REHEARING OR RECONSIDERATION UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

KURT SCHMIEDER,

Plaintiff,

NOTICE OF MOTION

Civil Action No. 69 Civ. 1939 (WK)

-against-

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the accompanying affidavit of Werner Galleski, Esq., sworn to the 16th day of October, 1975, plaintiff will move this Court before the Honorable Whitman Knapp, United States District Judge, Southern District of New York, courtroom No. 1105 at 2 p.m. on the 14th day of November 1975, United States Courthouse, Foley Square, New York, for an order amending the court's findings of fact and conclusions of law as set forth in its opinion dated September 25, 1975, and for an order granting plaintiff a new trial, a rehearing or reconsideration, all pursuant to Rules 52 and 59, Federal

900a

NOTICE OF MOTION FOR ORDER AMENDING THE OPINION ENTERED SEPTEMBER 25, 1975 AND FOR AN ORDER GRANTING PLAINTIFF A NEW TRIAL, REHEARING OR RECONSIDERATION UNDER RULES 52 & 59 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

_____X

KURT SCHMIEDER,

Plaintiff,

NOTICE OF MOTION

-against-

Civil Action No. 69 Civ. 1939 (WK)

LOUIS H. HALL, JR., as Preliminary Executor of the Estate of Helen B. Dwyer,

Defendant.

_____X

SIRS:

4

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the accompanying affidavit of Werner Galleski, Esq., sworn to the 16th day of October, 1975, plaintiff will move this Court before the Honorable Whitman Knapp, United States District Judge, Southern District of New York, courtroom No. 1105 at 2 p.m. on the 14th day of November 1975, United States Courthouse, Foley Square, New York, for an order amending the court's findings of fact and conclusions of law as set forth in its opinion dated September 25, 1975, and for an order granting plaintiff a new trial, a rehearing or reconsideration, all pursuant to Rules 52 and 59, Federal

